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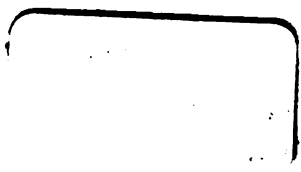
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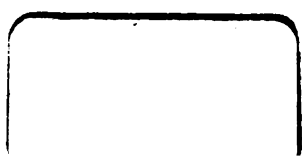
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1800





R E P O R T S
OF
C A S E S
DECIDED IN THE
HIGH COURT OF CHANCERY,

BY
THE RIGHT HON. SIR LANCELOT SHADWELL,
VICE-CHANCELLOR OF ENGLAND.

BY NICHOLAS SIMONS,
Of Lincoln's Inn, Esq. Barrister at Law.

VOL. VI.
CONTAINING CASES IN 1833 AND 1834,
WITH A FEW OF LATER DATE.

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LORD BROUGHAM and VAUX	- -	Lord Chancellor.
Sir J. LEACH	- - - - -	Master of the Rolls.
Sir W. HORNE	} - - - - -	Attorneys-General.
Sir J. CAMPBELL		
Sir J. CAMPBELL	} - - - - -	Solicitors-General.
Sir C. C. PEPPYS		

" 1 . . "

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CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

SCHLOSS v. STIEBEL.

BERNHARD STIEBEL, a naturalized British Subject domiciled at *Kingston* in *Jamaica*, by his Will dated the 8th of May 1830, gave to Trustees, two Sums of 4,000*l.* each, upon certain Trusts for the benefit of his Natural Sons, *Bernhard Stiebel* and *Philip James Stiebel*, and, after giving several other Legacies, he bequeathed the Residue of his Personal Estate to the same Trustees, upon certain Trusts for the benefit of his Natural Sons before-mentioned, and appointed the Trustees Executors of his Will.

The Testator, shortly after the date of his Will, left *Jamaica*, and went on a visit to his Relations, who resided at *Frankfort* in *Germany*, where he remained until his decease; and, during his residence there, he became much attached to the Plaintiff, and a Treaty of Marriage was set on foot between them, and they, thereupon, were engaged and betrothed to each other as intended Husband and Wife; and, during such engagement and betrothal, the Testator made a Codicil to his

1833:
29th January.

Legacy.
Construction.

A Testator domiciled in *Jamaica*, became, during a temporary residence at *Frankfort*, engaged and betrothed to a Lady; and by a Codicil, to his Will, after mentioning her by name, and alluding to his intended Marriage with her, he gave 3,000*l.* to his Wife. During the Engagement, but before the Marriage, the Testator died. Held that the Lady was entitled to the Legacy.

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1833.

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v.

STIEBEL.

Will, dated the 19th of August 1830, and which was as follows :

“ I, the undersigned *Bernhard Stiebel*, lately residing in *Kingston, Jamaica*, and now residing with my Family, being in best health, and sound of mind, wishing to alter a Will I made in the said Island, of which one is in the possession of my beloved Brothers, *Sigismund Stiebel*, and, in *London*, *Samuel Stiebel*, two of my Executors, Trustees of my Children I may have with her, Miss *Adelaide Schloss*, my Niece,* which I may marry in a few days, jointly with *Nathan Mayer Rothschild* and *Solomon Cohen*, Esquires, of *London*, as Co-Executors and Co-Trustees in case of need, namely, instead of the 5,000*l.*, I to my Sons *Bernhard Stiebel* and *Philip James Stiebel*, they are only to have 2,000*l.* sterling on my death when they are of age, provided my other Children which I shall have with Miss *Adelaide Schloss*, Daughter of my beloved Sister, should have not the same, then the other must give it to divide it alike. In case of my death, I leave to my Wife 3,000 *l.* sterling ; the rest of my Fortune Personal and Furniture, to my Wife, to my Children only begot by her, as the others before-mentioned are provided for. I name, likewise, my four Executors and Trustees as Residuary Legatees for the aforesaid *Adelaide Schloss*, my Wife, what may accrue, since the 1st of February 1830, in our business of *Samuel Stiebel* and Brothers, in *Kingston, Jamaica*, and *Samuel Stiebel* in *London* ; the Legacies to my beloved Family remain as per my

* It was stated, though there was no evidence of the fact, that the Testator and his intended Wife were Jews, and that, by the Jewish Law, a marriage between an Uncle and Niece was valid.

Testament: Made this year, *Frankfort*, the 19th of August 1830, *Bernhard Stiebel*."

1833.

SCHLOSS

v.

STIEBEL.

Upon this Codicil was written an Indorsement, in the handwriting of the Testator, as follows: "A Codicil to my Will made in *Kingston, Jamaica*, by *Bernhard Stiebel, Frankfort*, 19th August 1830; to be opened after my death.—*B. S.*"

On the 6th of October 1830, the Testator made another Codicil as follows: "*Frankfort*, October 6th, 1830. I, the undersigned *Bernhard Stiebel*, on my leaving *Jamaica*, had two Sons, *Bernhard Stiebel* and *James Stiebel*; left them a great Fortune to the prejudice of my Family, not being married to their Mother, which is not even named for not disgracing them. I annul that Amount of the former named, my Son *Bernhard*, and the other *James*; I make it only 1,000*l.* sterling to each of them: my Trustees in my former Will and Testament will strictly watch this my injunctions, this, if my death should, if God forbid, before they are of age, this 2,000*l.* are to be put out on Interest for their Education; should that not reach 2,000*l.* more, the latter to return to my Wife and Children, and to pay the Legacies left to my honoured Family in my last Testament. May God the Almighty bless us, that, for a hundred years, we may not have to open our Wills and Testaments wishes your affectionate and loving Brother, *Bernhard Stiebel*."

Upon this Codicil, was written an Indorsement in the handwriting of the Testator, in the following words: "Duplicate original in our dear Brother's Letter to

1833.

SCHLOSS

v.

STIEBEL.

Jamaica, Codicil to my last Will, not to be opened till after my death.—*B. Stiebel*."

The engagement and betrothal between the Testator and the Plaintiff, continued until the 15th of October 1830, when the Testator died a Bachelor.

The Bill alleged that the Plaintiff was the Person designated, in the Codicils, by the description of the Testator's Wife; and prayed that she might be declared to be entitled to the Legacy of 3,000*l.*, and also to the Residue of the Testator's Estate.

Mr. *Pepys* and Mr. *Kindersley*, for the Plaintiff, said that though there was, in the Will, a misdescription of the Plaintiff, yet her identity was clear; and that there was nothing, on the face of the Will, to show that the Bequests to the Plaintiff, were made upon the condition of her becoming the Testator's Wife. *Kennell v. Abbott* (a).

Sir *Edward Sugden* and Sir *George Grey*, for the Defendant, the Next of Kin of the Testator:

The question is whether this Testator intended to make the Plaintiff his Legatee, though no Marriage should be solemnized between them, and to provide for Children who never could be born. The Legacy is not given to the Plaintiff, by name, but only in the character of the Testator's Wife. If she had refused to marry the Testator, and had married some one else, could she then have claimed the Legacy? Our construction

CASES IN CHANCERY.

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gives, to every word in the Will, its natural import; whereas, to give effect to the Plaintiff's Claim, you are forced to conjecture that the Testator meant to provide for her, although he did not marry her. If there was no Wife, there was no Gift.

1833.

SCHLOSS
v.
STIEBEL.

Mr. *Koe*, for the Defendants, the Executors.

The VICE-CHANCELLOR:

The Legacy given to the Plaintiff, is not given on condition of the Testator marrying her. The Testator made his Will under the impression that his intended Marriage with the Plaintiff, would take effect; and he has described the Plaintiff with reference to his intention of marrying her. If the Legacy were not to take effect, things would not be placed in the same situation as they were in before, as the Legacies to the Natural Sons would still be reduced.

Declare that the Plaintiff is entitled to the Legacy of 3,000*l.*, absolutely, and to an Interest for Life in the General Residue.

1833 :
2d February.

KENNEDY v. GREEN.

*Purchaser.
Production of
Documents.
Fraud.*

A Deed in the custody of a Purchaser for valuable Consideration, which the Bill impeached for Fraud, ordered under special circumstances, to be produced.
best. op.

5. Bear. 131.

*Att. Gen. v. Thompson
8 Mare 113.*

THE Plaintiff Mrs. *Kennedy* had employed *Bostock*, her Solicitor, to lay out a Sum of Money for her on Mortgage, and, accordingly, he invested part of that Sum on Mortgage of some Leasehold Houses. The Mortgagor, afterwards, became Bankrupt, and *Bostock* purchased the Equity of Redemption of the Houses, from his Assignees. Afterwards, *Bostock* called upon the Plaintiff and produced a Document, which he represented it was necessary for her to execute, in order to enable her to receive the Interest of the Mortgage-money more punctually in future; and the Plaintiff, on the faith of that representation, signed the Document. *Bostock* afterwards became Bankrupt, and the payment of the Interest having ceased, the Plaintiff made inquiries as to the cause, when she discovered that the Document which she had signed, was an Assignment of the Mortgage to *Bostock*, and that he had mortgaged the Houses to the Defendant *Kirby*.

The Bill was filed to set aside the Assignment, for Fraud. It alleged that the Plaintiff executed the Deed under the impression that it was a Power of Attorney; that, when she signed the Receipt on the back of the Deed, the Deed was folded down, so that she could not see what she was signing; and that the Fraud practised on the Plaintiff in procuring her Signature to the Receipt, would appear on inspection of the Deed. *Kirby*, in his Answer, said that he had advanced 2,000 l., to *Bostock*, on the security of the Houses, and denied, generally, all notice or suspicion

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7

of any Fraud having been practised on the Plaintiff, in procuring the Assignment from her.

1833.

KENNEDY

v.

GREEN.

The Plaintiff now moved for a production of the Assignment.

Mr. *Pepys* and Mr. *Girdlestone*, in support of the Motion, cited *Balch v. Symes* (a); *The Princess of Wales v. The Earl of Liverpool* (b); and *Beckford v. Wildman* (c).

Mr. *Knight* and Mr. *Hughes*, for the Defendant *Kirby*, relied on the Defendant being a Purchaser for Valuable Consideration without notice, and cited *Tyler v. Drayton* (d); *Rowe v. Teed* (e); and *Codrington v. Codrington* (f).

The VICE-CHANCELLOR :

This is a Motion for the Production of a Deed which constitutes the Defendant's Title, and which the Plaintiff seeks to impeach for Fraud. The Plaintiff alleges that certain suspicious circumstances appear on the back of the Deed, which tend to show that the execution of it was obtained from her by Fraud; and, though the Defendant says that he is a Purchaser for Valuable Consideration without notice of the Fraud, he does not deny that he had notice of those circumstances. Now a Purchaser for Valuable Consideration, is bound to answer all the Allegations that tend to show that he had notice of the Fraud; and the Defendant not

(a) 1 Turn. & Russ. 87.

(b) 3 Swanst. 567.

(c) 16 Ves. 438.

(d) 2 Sim. & Stu. 309.

(e) 15 Ves. 372. 15 May 16

(f) *Ante*, Vol. III. p. 519.

B 4 17 280 1726 100

1833.

KENNEDY

v.

GREEN.

having done so, I think that he ought to produce the Deed.

Motion granted (*g*).

(*g*) The Cause was afterwards heard before Sir *J. Leach*, M. R. His *Honor* decreed in the Plaintiff's favour, on the ground of the suspicious circumstances appearing on the back of the Deed, and Lord *Brougham*, C. affirmed the Decree.

1833:
2d & 5th Feb.
& 21st March.

*Production of
Document.*

A voluntary Deed belonging to the Defendant, which the Bill impeached for Fraud, and which was in the custody of the Defendant's Solicitor, who claimed a Lien on it, ordered to be produced for the Plaintiff's inspection, after it had been proved by the Defendant, and Publication had passed.

ante. 6
21 Feb. 1833.
4 Jan. 29.

FENCOTT v. CLARKE.

THE Bill was filed to set aside a voluntary Deed, made in favour of the Defendant *Clarke*, on the ground that it had been obtained from a Person of unsound mind. The Deed was in the hands of the Defendant *Devereux*, *Clarke's* Solicitor, who claimed a Lien upon it, and had been produced and proved in the Cause on behalf of *Clarke*. The Plaintiff, *after Publication had passed*, moved that *Devereux* might be ordered to produce the Deed.

Mr. *Rudall*, in support of the Motion, cited *Beckford v. Wildman* (*a*), and *Balch v. Symes* (*b*).

Mr. *Stinton*, *contra*, cited *Davers v. Davers* (*c*); *Wright v. Mayer* (*d*); *Forester v. Helm* (*e*); *Hodson v. Earl of Warrington* (*f*).

(*a*) 16 Ves. 438.

(*b*) 1 Turn. & Russ. 87.

(*c*) 2 P. W. 410.

(*d*) 6 Ves. 280.

(*e*) Maclel. 558.

(*f*) 3 P. W. 34.

Att. Gen. v. Thompson & Hare 114.

The *Vice-Chancellor*, at first, hesitated about granting the Motion, as Publication had passed; but, after having read the Bill and Answer, His *Honor* said that he saw no reason why he should not order the Deed to be produced in the usual way.

Motion granted.

1833.

FENCOTT
v.
CLARKE.

PRYTHARCH v. HAVARD.

THIS was a Suit, instituted by a Purchaser, for a Specific Performance.

The Vendor, after entering into the Contract, had died leaving an Infant Heir.

The *Vice-Chancellor* decreed a Specific Performance, and said that a Petition must be presented, under 11 Geo. 4, and 1 Will. 4, c. 60, for an Order that the Infant Heir might convey to the Purchaser: and His *Honor* ordered the Costs of the Suit to be paid out of the Purchase-money, and the Residue to be paid to the Executors of the Vendor (a).

Mr. *Jeremy*, for the Plaintiff.

Mr. *Evans*, for the Defendants.

1833:
8th February.

Specific Performance.

Infant. Costs.

After Decree in a Suit for Specific Performance, against the Infant Heir of the Vendor, a Petition must be presented under 11 Geo. 4, and 1 Will. 4, c. 60, for an Order that the Infant may convey to the Purchaser. The Costs of the Suit were ordered to be paid out of the Purchase-money. *Int. vol. 11. 57*

(a) See *Felthams v. Till*, ante, Vol. V. p. 319.

1833 :
8th February.

*Interpleader.
Principal and
Agent.*

Where a Principal has created a Lien in favour of another Person, on Funds in the hands of his Agent, the Agent may file a Bill of Interpleader against his Principal and the other Claimant.

SMITH v. HAMMOND.

IN May 1830, a Brig of which the Defendant *J. Hammond*, who was an *American* Citizen, was the sole Owner, was wrongfully captured by a Squadron belonging to the *Portuguese* Government; in consequence of which a Claim to Compensation was made on that Government, on his behalf. In May 1831, he executed a Power of Attorney to the Plaintiffs, *Duff & Co.*, who were Merchants in *Lisbon*, authorising them to receive for him, as his Agents, any Monies that might become payable in respect of his Claim. In November 1831 the *Portuguese* Government admitted the Claim, and the 1st of January 1832 was fixed for the payment of the first Instalment on account of it; but *Hammond*, as he alleged, did not know that his Claim had been admitted until March 1832. In December 1831, *Hammond*, in consideration (as he alleged) of the Defendant *C. Allen*, having promised to use his influence with the *American* and *Portuguese* Governments, in procuring the recognition and payment of the Claim, executed an irrevocable Power of Attorney to *Allen*, who resided at *Providence* in *America*, authorizing him to receive the Monies to be recovered from the *Portuguese* Government; and, in January following, he executed an Instrument in the following words: "Know all Men by these presents, that I, *John Hammond*, owner of the Brig *Ann* and Cargo, lately seized and condemned by the *Portuguese* Government, having appointed *C. Allen*, of *Providence*, to be my Agent and Attorney for recovering of my Claims on that Government, do hereby agree to pay to the said *C. Allen* 10 per cent. on all Sums which he may recover,

until the amount recovered shall equal the Sum of 8,000 dollars, and, upon all Sums over the amount of 8,000 dollars so recovered, I agree to pay him 33 per cent., which Commission he is to retain out of any Sums recovered."

1833.
SMITH
v.
HAMMOND.

In July 1832, *Hammond* received from *Duff & Co.* a letter dated the 16th of June 1832, stating that they had received, from the *Portuguese* Government, 1,480*l.* in respect of his Claim, and that they would give orders to the other Plaintiffs, *Smith, Woodhouse & Co.*, their Agents in *London*, to honour his Drafts to that amount; and, on the 3d of August *Duff & Co.* wrote to *Smith, Woodhouse & Co.* as follows: "We have authorized Captain *John Hammond* to draw on you for 1,480*l.* and have desired him to advise you of his Draft, which you will please to honour, and debit our Account with the amount." On the 5th of September, *Smith, Woodhouse & Co.* wrote in answer as follows: "We shall follow your instructions and honour Captain *J. Hammond's* Draft on us for 1,480*l.* on your account." On the 17th of August 1832, *Hammond* wrote a letter to *Smith, Woodhouse & Co.*, desiring to be informed whether the 1,480*l.* would carry Interest whilst in their hands, and adding that, if it would, he should wish it to remain there for some time; but, if not, he should draw for it on the receipt of their answer. On the 1st of October, *Smith, Woodhouse & Co.* wrote, in answer, that the 1,480*l.* would remain to the credit of *Duff & Co.*, at Interest at Four per Cent., until they paid *Hammond's* Drafts. On the 30th of the same Month, *Smith, Woodhouse & Co.* received two Letters from *Hammond*, stating that, some time ago, he had given a Power of Attorney to *Allen*, but that *Allen* had then no power to act, and

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desiring them not to pay any Money to *Allen* until they heard from him. In November 1832, *Smith, Woodhouse & Co.* were served with a Notice, signed by the Solicitors of *Thomas Wilson & Co.*, who were *Allen's* Agents in *London*, stating that, on the 2d of December 1831, *Hammond* had made over his Claim to the proceeds of the Brig, to *Allen*, and requiring them not to pay over the Funds in their hands to any other Person.

Under these circumstances, *Smith, Woodhouse & Co.*, and *Duff & Co.* filed a Bill against *Hammond* and *Allen*, praying that they might interplead and settle their rights to the 1,480 l., and that they might be restrained from commencing any Action against the Plaintiffs to compel payment of that Sum.

Hammond, who had arrived in *England*, appeared to and put in an Answer to the Bill, stating that it was not his intention that the Instruments which he had executed to *Allen*, should authorize *Allen* to receive the Monies that might become payable to him from the *Portuguese* Government, or give *Allen* any interest therein otherwise than as his Agent; and that, on the 5th of October 1832, he wrote a letter to *Allen*, whereby he wholly determined and put an end to *Allen's* powers and authorities under those Instruments, and, for more effectually preventing *Allen* from receiving any Monies by virtue of them, he wrote to *Smith, Woodhouse & Co.* the Letters which were received by them on the 30th of October.

Allen, being in *America*, had not appeared to or answered the Bill when the Motion after-mentioned was made; but one of the Partners in the firm of *Thomas*

Wilson & Co., made an Affidavit, stating that he and his Partners had received, from *Allen*, the Instruments which *Hammond* had executed, and had forwarded them to their Agents in *Lisbon*, without keeping any Copies thereof: that the Deponent believed that those Instruments amounted to an Assignment of the Funds to be recovered from the *Portuguese* Government, or, certainly, to an irrevocable authority to receive the same: that the Deponent was led to believe, by the Papers received from *Allen* and forwarded to *Lisbon*, that *Allen* had assisted, through the intervention of the *American* Government, in obtaining the recognition or payment of the Claim; and that, if sufficient time was afforded for *Allen* to put in his Answer, he would show the grounds on which he was entitled to receive the 1,480*l.*: that the Deponent had instructed *Allen's* Solicitors in the Suit, to send out to him the necessary Documents to enable him to swear to his Answer, and to return the same to *England* without delay; and that the Deponent and his Co-partners had written to and informed *Allen* of the Notice given to *Smith, Woodhouse & Co.*, and requested him promptly to furnish the means of legally establishing his Claim.

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Hammond now moved that the Injunction, which the Plaintiffs had obtained, might be dissolved, and that the 1,480*l.*, which the Plaintiffs had paid into Court, might be paid out to him.

Mr. *Pepys*, for the Plaintiff.

Mr. *Knight* and Mr. *Stephens* for the Defendant *Hammond*, contended that the Plaintiffs were *Hammond's* Agents, and had no right to file a Bill of Inter-

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pleader in respect of Monies received by them in that character: *Nicholson v. Knowles* (a): that, as the Power of Attorney which had been executed to *Allen*, had been revoked, it was clear that no Claim could be supported by him.

Mr. *G. Richards*, for the Defendant *Allen*, said that it was clear that *Allen* had a Lien on the Fund, which had been created by *Hammond*: that it resembled the Case in which a Tenant is entitled to file a Bill of Interpleader against his Landlord; and that, at all events, a reasonable time ought to be allowed for *Allen* to put in his Answer.

The VICE-CHANCELLOR:

The Proposition in *Nicholson v. Knowles*, seems to be laid down rather widely: that Case, however, does not apply to the present.

The Instruments which *Hammond* executed to *Allen*, appear to me to amount to an Assignment of the Fund in question, and I think that the Plaintiffs are Stakeholders.

The adverse Claims must be decided upon in some way or the other; and the question is, whether that should be done by referring it to the *Master* to ascertain whether *Allen* has any and what Claim on the Fund, or by letting *Hammond* bring an Action against the Plaintiffs, and giving *Allen* liberty to defend it.

The Order pronounced was that it should be referred to the *Master* to ascertain whether *Allen* had any and

(a) 5 Madd. 47.

what Claim on the Fund ; that he, being in the situation of a Plaintiff and being resident Abroad, should give security for Costs to the amount of 100*l.*; and that the Plaintiffs' Costs should be paid out of the Fund, without prejudice to the question by whom those Costs should be ultimately paid (*b*).

(*b*) See *Mason v. Hamilton*, ante, Vol. V. p. 19, and *Crawshay v. Thornton*, post.

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FOSTER v. EVANS.

1833:

11th February.

Portions.
Satisfaction.

THOMAS OLDHAM gave to *J. Wilson, R. Evans* and *W. Oldham*, his Bond for 6,000*l.*, dated the 11th of April 1811, for securing to them the payment of 3,000*l.* on the 11th of April 1819, with lawful Interest in the meantime, to be paid and applied by them according to the Trusts and Directions contained in the Settlement on the Marriage of his Daughter with *John Foster*. By the Settlement, after reciting the intended Marriage and the Bond, and that *Foster* had agreed to secure, to the same Trustees, the like sum of 3,000*l.*, by his Bond, to be paid at the expiration of ten years from the solemnization of the Marriage, but without Interest in the meantime, and to be settled upon the Trusts and for the purposes thereafter expressed, and that he had executed his Bond to the Trustees accordingly; it was declared that the Trustees should invest the said sums of 3,000*l.* and 3,000*l.*, when payable, in the purchase of Government or Real Securities, in Trust, during the joint Lives of Mr. and Mrs. *Foster*, for Mr. *Foster*, and, after the decease of either of them,

On a Marriage, the Father and Husband of the Lady, gave Bonds for 3,000*l.* each, to be paid to the Trustees upon the Trusts of the Settlement. The Father died, leaving the whole of the Principal and some of the Interest, due on his Bond, and having bequeathed 3,000*l.* to his Executors, upon the same Trusts for the benefit of

his Daughter and her Husband and their Issue, as were declared, by the Settlement, of the Trust-monies therein comprised. Held that the Legacy was not a satisfaction of the Father's Bond.

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for the Survivor, for life, and, after the decease of the Survivor, in Trust for the Children of the Marriage as therein mentioned ; and, if all the Sons of the Marriage should die without Issue before 21, and all the Daughters, before 21 and without having been married, then, in case Mr. *Foster* should die in the lifetime of his Wife, in Trust, as to one Moiety of the Trust Monies, for his Executors, &c., and, as to the other Moiety, in Trust for such Persons, &c., as Mrs. *Foster* should appoint, and, in default of appointment, in Trust for *Thomas Oldham*, his Executors, &c.; and, in case Mr. *Foster* should survive his Wife, then, as to the whole of the Trust Monies, in Trust for him absolutely.

Thomas Oldham, by his Will, dated the 23d of May 1832, after devising certain Freehold Estates, gave all his other Real Estates, to *R. Evans*, *John Foster* and *E. Hemsley*, in Fee, upon Trust to pay the Rents to Mrs. *Foster*, for her separate use, for life, and, after her decease, to stand seised of the same upon such Trusts, &c. as Mrs. *Foster* should appoint, and, in default of Appointment, in Trust to sell the same, and to invest the Proceeds in Government or Real Securities, and to stand possessed thereof upon the Trusts thereafter declared. The Testator afterwards proceeded thus: "I give and bequeath unto the said *R. Evans*, *John Foster* and *E. Hemsley*, their Executors, Administrators and Assigns, the sum of 3,000 l., upon Trust to lay out and invest the same in the manner hereinbefore directed with respect to the Monies to arise from the Sale of the Hereditaments secondly hereinbefore devised, with the same powers of varying Securities ; and I direct the said *R. Evans*, *John Foster* and *E. Hemsley*, their Executors, Administrators and Assigns, to stand possessed

of the said sum of 3,000 *l.*, and the Stocks, Funds and Securities, in or upon which the same shall be laid out or invested, *upon the same Trusts* for the benefit of my Daughter, *Ann Maria Foster* and *John Foster*, and their Issue, *as by the Settlement made previous to, and in contemplation of the Marriage of the said Ann Maria Foster with the said John Foster, her present Husband, are expressed and declared of the said Trust Monies, Stocks, Funds, and Securities comprised in such Settlement.*" And the Testator appointed *R. Evans, J. Foster* and *E. Hemsley*, Executors of his Will.

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The Testator died on the 1st of September 1832, leaving the whole of the Principal and some of the Interest due on his Bond, but which his Executors paid after his death.

The Bill was filed by Mr. and Mrs. *Foster* and their Children, against *Evans* and *Hemsley*, stating that the Executors had refused to invest the 3,000 *l.* as directed by the Will, on the ground that that Legacy was given in satisfaction of the Bond, and praying that the Plaintiffs might be declared entitled to the benefit of that Legacy, in addition to the 3,000 *l.* secured by the Bond, and that it might be invested, out of the Testator's Assets, upon the Trusts of the Settlement.

The Defendants put in a general Demurrer.

Sir *E. Sugden* and Sir *George Grey* in support of the Demurrer :

The general rule is that, if a Child is already provided with a Portion, and the Father, by his Will, gives a like Sum to the Child, the latter is in lieu of the

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former. The question then is, whether the words of reference, in this Will, take the Case out of the general rule. There are two Sums of 3,000 l. comprised in the Settlement, one of which came from the Father, and the other from the Husband, and the words of reference may be considered as applying to that Sum which did not come from the Father.

Mr. *Knight* and Mr. *Chandless* appeared in support of the Bill. But

The *Vice-Chancellor*, without hearing them, said that it appeared, on the face of the Will, that the Testator did not intend the Legacy to be a satisfaction of the Bond. For, as he referred to the Settlement, it was clear that he had it in his recollection when he made his Will; and, consequently, if he had intended the Bequest to be a Satisfaction of what was due on his Bond, he would have so declared.

Demurrer overruled.

1833 :
12th February.

IN RE WILLOUGHBY'S CHARITY.

New Orders.
Practice.
Service.

THIS was a Charity Petition, to which the Trustees of the Charity were Respondents, and they had been ordered to pay the Costs of the Petition.

The Respondents to a Charity Petition, are Parties to it, and, therefore, they are not within the 44th Order.

Upon an Application made, by Mr. *Treslove*, relative to the service of the Order,

The *Vice-Chancellor* ruled that the Trustees, being Respondents, were Parties to the Petition, and, therefore, that the Case was not within the 44th of the New Orders of 1828.

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In re
WILLOUGHBY'S
CHARITY.

COLLETON v. GARTH.

1833 :
16th February.

THE Testator in this Cause bequeathed, to his Wife, the Lease of his House in *Baker-street*, and the Household Furniture, Plate, Pictures and certain other Articles therein. The Lease having expired in the Testator's Life-time, part of the Furniture was sold, and the Remainder, together with the Plate, Pictures and other Articles, was removed to a House which the Testator took in *Edward-street*.

Construction.
Widow.

A Rent-charge expressed to be for a Jointure, and in lieu of Dower and Thirds at Common Law, does not bar the Jointress of her Distributive Share in her Husband's undisposed-of Personal Estate.

One of the Questions in the Cause was whether the Testator's Widow was entitled to the remainder of the Furniture, and to the other Articles.

Another Question was whether the Widow was excluded from her Distributive Share of the undisposed-of residue of the Testator's Personal Estate, in consequence of the Testator having, on his Marriage, settled on her a Rent-charge, for her Jointure, and in lieu of Dower and Thirds at Common Law.

Legacy.
Ademption.

Testator gave, to his Wife, his House in *B.* and the Furniture in the said House. The Lease of the House expired in the Testator's life-time, and he took another House, and re-

The *Attorney-General*, Mr. *Pepys*, Mr. *James* and Mr. *Girdlestone*, Junior, for the Testator's next of Kin, contended, first, that the Will, in this case, must be

moved his Furniture to it. Held that the Legacy was adeemed.

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Harris v. Harris 2. G. 74.
Thompson v. Watts 2 S. & A. 296.

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considered to speak as at the Testator's death, and that all the Articles having been removed, and part of the Furniture having been sold, by the Testator, the Bequest had failed. *Green v. Symonds* (a); *Heseltine v. Heseltine* (b). Secondly, that the Jointure, being expressed to be in lieu of Thirds at Common Law, the Widow was barred of her Distributive Share of the residue. *Walker v. Walker* (c); *Davila v. Davila* (d); *Glover v. Bates* (e); *Druce v. Denison* (f); *Garthshore v. Chalie* (g).

Sir *Edward Sugden* and Mr. *Garratt*, for the Widow, said that, when the Lease of the House expired, the Furniture, &c. were removed, from necessity, and not with the intention of adeeming the Legacy; that it was like the Case mentioned, by Lord *Hardwicke*, in *Green v. Symonds*, of the removal of Goods to save them from Fire, or the Case mentioned, in *Swinburne*, of a Testator receiving a Sum of Money which had been secured by Mortgage, and laying it by for the Legatee; that, in *Heseltine v. Heseltine*, the Gift was, specifically, of the Property that should be in the Testator's House at the Time of his Death; that, in *Green v. Symonds* the Testator was dealing with Personal Estate, generally; but here there was no general Gift of Personal Estate, nor did the Testator speak of Furniture, &c. in his House at the time of his death, but he spoke of the Furniture, &c. as being in the House, merely for the purpose of identifying it. *Land v. Devaynes* (h).

(a) 1 Bro. C. C. 128, note.

(b) 3 Madd. 276.

(c) 1 Vez. 54.

(d) 2 Vern. 724.

(e) 1 Atk. 439.

(f) 6 Ves. 385.

(g) 10 Ves. 1.

(h) 4 Bro. C. C. 537.

Mr. *Knight* and Mr. *Girdlestone*, senior, appeared for other Parties.

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The VICE-CHANCELLOR :

It is clear that the Rent-charge was intended to be in lieu only of any Claim which the Wife might have upon her Husband's *Lands*; and that the Testator made the Bequest of the Furniture, &c. with reference to giving the Lease, and that he had in contemplation an enjoyment of the House with the Furniture, &c.; and, consequently, the Bequest has totally failed by the change of Circumstances.

Declare that the Widow is not barred of her Distributive Share of the undisposed of residue of the Testator's Personal Estate, and that she is not entitled to any part of the Furniture, &c.

TANNER v. RADFORD.

1833 :
19th February.

JOHN RADFORD, being seised in Fee of the Advowson of the Rectory of *Lapford*, in the County of *Devon*, on his Marriage in 1763, settled it on himself for life, with Remainder to the use of all and every, or such one or more of the Sons of the Marriage, for such Estate, not exceeding an Estate in Tail Male, and in such Shares, &c. as *Radford* and his intended Wife should, during their joint lives, appoint; and, in default thereof, and in case *Radford* should survive his intended Wife, to the use of all and every, or such one or more of the Sons of the Marriage, for such Estate not exceeding an Estate in Tail Male, and in such Shares and

*Tenant in Tail.
Recovery.
Resulting Use.*

If a Tenant in Tail suffers a Recovery, and declares Uses which are void, he does not take back an Estate Tail, but an Estate in Fee.

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Proportions, and with or without power of Revocation, as *Radford* should, after his Wife's death, by Deed, or by his Will, to be executed and attested as therein mentioned, appoint; and, in default thereof, to the use of the first and other Sons of the Marriage successively in Tail Male, with Remainder to the use of the Daughters of the Marriage, as Tenants in common in Tail, with Cross Remainders in Tail, with Remainder to the use of *Radford*, his Heirs and Assigns for ever.

There was Issue of the Marriage two Sons, *John*, who died an Infant in the lifetime of his Father and Mother, and *William*, who was the Testator in the Cause, and two Daughters. Mrs. *Radford* died in the year 1770, leaving her Husband surviving.

By Indentures of Lease and Release, dated the 7th and 8th of November 1790, and made between *John Radford*, and *William Radford* therein described as Son and Heir Apparent of *John Radford*, of the first part, *Nath. Batten* of the second part, and *Arundel Radford*, Clerk, of the third part: It was witnessed that, for barring and docking all Estates Tail and Remainders thereupon expectant of and in the Advowson and other Hereditaments thereafter mentioned, and for assuring the same to the Uses after-mentioned, *John Radford* and *Wm. Radford* conveyed and appointed unto and to the use of *Batten*, in Fee, (together with other Hereditaments) the Advowson of *Lapford*, then in possession of *John Radford* as the then Incumbent thereof, to the intent that he might become Tenant of the Freehold, in order to the suffering a common Recovery, the Uses whereof were thereby declared to be, so far as concerned the Advowson, upon

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Trust that *Arundel Radford* and his Heirs should, at all times thereafter, when and so often as the Rectory of *Lapford* should become vacant by the Death, Resignation, or otherwise, of the then present or any future Incumbent, nominate and present *Wm. Radford*, if he should be then in Priest's Orders, to the Rectory aforesaid, or, if he should be then dead, then upon Trust to present *the first and other Sons, or Issue Male of the Body of Wm. Radford*, as they and every of them respectively should be in seniority of age and priority of birth, *and when respectively legally and duly qualified to be nominated and presented thereto*, or, in case such eldest or other Son or Issue Male of *Wm. Radford* should, by reason of nonage or otherwise, be incapacitated of being presented to the Rectory, then *Arundel Radford*, or his Heirs, should, in the meantime and before such incapacity should be removed, present such other of the Sons or Issue Male of *John Radford* that should be then living and duly qualified to fill any such Vacancy so happening, as *Wm. Radford*, by any Deed or Instrument in Writing, or by his last Will and Testament in Writing, under his Hand and Seal, duly executed in the presence of and attested by three or more credible Witnesses, should direct and appoint, and, for want of such appointment, then upon Trust that *Arundel Radford* and his Heirs should present to the Rectory such other of the Sons or Issue Male of *John Radford*, as the eldest Son of *Wm. Radford* who should live to survive him, should appoint, during all such time and no longer than such eldest or other Son or Issue Male of *Wm. Radford* should, by nonage or otherwise, be incapable of being presented thereto, *Arundel Radford* or his Heirs taking a Bond in a sufficient Penalty, or other Legal Security for such

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Son or Issue Male of *John Radford* as should be presented thereto, to resign the same to a Son or Issue Male of *Wm. Radford*, as soon as such Son or Issue Male of *Wm. Radford* should be capable of holding the same Rectory, and so, from time to time, as long as any Issue Male descending from *Wm. Radford* should be living and capable of holding the Rectory, and, for want of Issue Male, descendants of *Wm. Radford*, or there being such, and all of them should die and become totally extinct, in Trust to convey and assure the Advowson unto and to the Use of the right Heirs and Assigns of *John Radford* for ever, and for *no other use, intent, or purpose whatsoever*.

The Recovery was duly suffered in Michaelmas Term, in the 31st year of Geo. 3.

John Radford, by his Will dated the 20th of December 1792, after reciting that he, or *Arundel Radford* in Trust for him and his Heirs, was seised of the Reversion of the Advowson of *Lapford*, expectant on the death of his Son *William* without leaving Issue Male of his body, devised, directed and appointed that *Arundel Radford* and his Heirs, should stand seised of the Reversion, on such contingency happening, to the use of certain Trustees therein named, for the Term of 400 years, and, after the expiration thereof, and, in the meantime, subject thereto, to the use of the Testator's eldest Son, *James Radford*, by his second Wife, for life, with Remainders to his first and other Sons in Tail Male, with Remainders to the Testator's other Sons by his then Wife successively for Life, with Remainders to their Sons in Tail Male: and he declared the Trust of

the Term to be for raising 1,000*l.* for his younger Sons by his then Wife.

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William Radford survived his Father *John Radford*, and, by his Will dated the 24th of April 1821, directed that, if his Son *John Arundel Radford* should obtain Holy Orders and become a Priest, then he should take the Rectory of *Lapford* to him and his Heirs for ever; but, if he should not obtain Holy Orders, then the Testator gave the Rectory to his Son *Charles* and his Heirs.

John Arundel Radford took Orders and was instituted to the Rectory.

The Bill was filed by Creditors of *William Radford*, against his Widow and Children: and, by the Decree made on the hearing of the Cause, the *Master* was ordered to inquire and state what Real Estates the Testator, *William Radford*, died seised and possessed of.

The *Master* reported that the Defendant, *John A. Radford*, had submitted before him, that the Testator, *William Radford*, was Tenant for his own life of the Advowson of *Lapford*, and that such Estate for Life determined, therefore, with the Testator's life; and that the Advowson, although specifically devised by the Testator's Will, did not pass by such devise, but that, immediately upon the decease of the Testator, the Defendant *John A. Radford* became seised of it as Tenant in Tail: but the *Master* found that the Testator, *Wm. Radford*, died seised in Fee of the Advowson, discharged of the Land Tax which had been redeemed by him.

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Deed, had failed, the prior Limitations must be held to be restored, as it must be presumed that the Parties to the Recovery, did not intend to defeat the old Settlement, except for the purpose of giving effect to the new one: that the ultimate Limitation in the Deed of 1790 being, "Unto and to the use of the right Heirs and Assigns of *John Radford* for ever, and for no other use, intent or purpose whatsoever," it was impossible to imply, against that declaration, any Use or Estate that would deprive *J. Radford* of his Reversion in Fee: that, in all the old Cases, it was laid down that, if a man suffers a Recovery or levies a Fine and limits no Use, it shall enure to the old or former Uses (*b*); and although, in

Deed, were void, and, if so, that the Fee resulted to *William Radford* in Equity. But, in this particular Case, he was inclined to think that the Use would result, in Equity, according to the former Estates; and, if so, that *John Arundel Radford* was Tenant in Tail.

Another of the Counsel consulted for the same Parties, was of opinion that, subject to the Trust to present *William Radford* (which alone was valid) the beneficial Interest in the Advowson, resulted to *J. Radford*, for Life, Remainder to *William Radford*, for a Base Fee, Reversion to *William Radford* in Fee.

(*b*) 2 Roll's Ab. 789. *Bury v. Taylor*, Godb. 179. *Waker v. Snowe*, Palm. 359. *Argol v. Cheney*, Latch 82. *Armstrong v. Wholesey*, 2 Wils. 19. Gilb. Uses, Sugden's edit. 110. 119. See also 1 Cruise's Dig. 451, 452, 453. It was said, by Sir E. Sugden, in the course of the argument, that the Case of *Nightingale v. Earl Ferrers*, 3 P. W. 206, was not an authority for the proposition laid down by Mr. Cruise, "that, where a Tenant in Tail suffers a Common Recovery, without any Declaration of Uses, the resulting Use is to him in Fee Simple," for the only question in that case, was whether the Uses were well raised by the Marriage Articles: and it appeared that the Remainder-man had given a Sum of

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some modern Cases, it had been held that where a Father, Tenant for Life, and his Son, Tenant in Tail, suffer a Recovery and declare no Uses, the Father takes back an Estate for Life, and the Son an Estate in Fee, those Cases had no bearing upon the present, where the Uses declared were at variance with the Uses implied, and it was not the intention of the Parties to give, to the Son, an Estate in Fee ; but, the Uses declared being void, the Recovery must be held to enure to the Uses of the former Settlement ; and, consequently, the Exception must be allowed.

Mr. *Knight* and Mr. *James Russell* appeared for the Plaintiffs, in support of the Report.

The VICE CHANCELLOR :

The meaning of the expression, found in the old Cases, that, where a Recovery is suffered without any Use being limited, it enures to the old Use, is, I conceive, that the Use results to the former Owner ; and, in that sense, it is the old Use (c).

Where the Parties to a Recovery declare Uses which are void, they have, in Law, done nothing at all. The

Money to the Earl and Countess of *Northampton*, to join in a Fine and Recovery to re-settle the Estate.

(c) A Recovery suffered of an Estate in Fee, does not alter the descent. *Abbot v. Burton*, 11 Mod. 181. And, if a Tenant in Tail by Descent *ex parte Maternâ*, suffers a Recovery which enures to the use of himself in Fee, the course of Descent is not altered. See *Martin v. Strachan*, 5 T. R. 107, note. *Roe v. Baldwere*, *ibid.* 104. See the Observations on the former Case in *Gilb. on Uses*, Sugden's edit. 123, note.

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effect of a Recovery suffered by a Tenant in Tail, without any declaration of Use, is to enlarge the Estate Tail into a Fee; and, if Uses or Trusts are declared which cannot take effect, the effect is, merely, to leave the Fee in the Tenant in Tail.

In my opinion the point is clear; and the Exception must be overruled.

ANGELL v. WESTCOMBE.

1833:
20th February.

Demurrer.
Bill of
Discovery.
Pleading.

UPON the argument of a Demurrer, one question was, whether the usual Prayer for General Relief, if found in a Bill which, in other respects, was a Bill of Discovery only, did not, of itself, make it a Bill for Relief.

A Bill praying Discovery, and concluding with the Prayer for General Relief, is a Bill for Relief. But if words adapted to a Bill for Relief, are used in the Prayer of Process only, it is a Bill of Discovery.

Sir *E. Sugden* and Mr. *Walker*, in support of the Demurrer, cited *Ambury v. Jones* (a).

Mr. *Knight*, Mr. *Preston*, Mr. *Flather*, and Mr. *Dickson*, in support of the Bill, cited *Brandon v. Sands* (b).

The VICE-CHANCELLOR:

The Prayer for General Relief is inserted by Counsel; and, if it is found in a Bill which, in other respects, seeks Discovery only, it converts the Bill into a Bill for Relief. But the words, in the Prayer of Process: "To stand to and abide such Order and Decree, &c." are in-

(a) 1 Younge, 199.

(b) 2 Ves. jun, 514.

serted by the Clerk, and, therefore, do not make it a Bill for Relief.

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WESTCOMBE.

18 Decr. 430.

In every Case, it ought to appear, most distinctly, whether the Bill is for Relief or for Discovery only; for, if that matter is left in doubt, the Defendant may put in his Answer, and then the Plaintiff may amend his Bill by praying specific Relief. The general opinion of the Profession was against the decision in *Brandon v. Sands*.

I will, however, allow the Plaintiff in this Case to amend his Bill, by striking out the Prayer for General Relief.

EXTON v. SCOTT.

1833:
22 February.

L. HAMPSON, a Banker and Solicitor, was, under his Marriage Settlement dated in 1786, Tenant for Life of certain Estates in *Bedfordshire*, with remainder to his Daughters in Fee; and the Trustees of the Settlement were empowered, with the consent of the Tenant for Life, to sell the Estates and lay out the Purchase-money in the purchase of other Estates to be settled to the same Uses; and, in the meantime, the Purchase-money was to be invested in Government or Real Securities. In 1809, 1810, & 1812, *Edward Hampson*, the brother of *L. Hampson*, and the surviving Trustee of the

Deed. Escrow.
Debtor and
Creditor.

A. having received Monies belonging to *B.* privately, and without any communication with *B.*, prepared and executed a Mortgage to him for the amount. *A.* retained the

Deed in his custody for 12 Years, and then died insolvent. After his death, the Deed was discovered in a Chest containing his Title-deeds. Held that the Deed was not an Escrow, there being no evidence to show that it was executed conditionally, but that it took effect from its execution, and was good against *A.*'s Creditors.

Palmer v Newell 20 Decr. 36.
Lloyd v Atkwood 3 Feb. 43. 655.
Cory v Lye 1 D. C. & S. 1166.
Butt v Jones 11 Ch D. 2

3. Decr. 331.

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Settlement, at the request of *L. Hampson*, sold certain parts of the settled Estates, and the Purchase-monies were paid into *L. Hampson's* Bank, to an Account intituled, "*Messrs. L. & E. Hampson, Trust Money.*" The Monies so paid in, were afterwards invested in the purchase of Navy Five per Cents. in the name of *L. Hampson* alone, and, between January and August in 1812, he sold out part of the Stock, and in December 1814, he sold out the remainder, amounting to 5,000 *L.*

In July 1811 and December 1812, *L. Hampson's* two Daughters married, and Sir *John Filmer* and *Richard Gilpin* were the Trustees of their Settlements.

By an Indenture, dated the 18th of December 1812, and expressed to be made between *L. Hampson* of the one part, and Sir *John Filmer* and *Richard Gilpin* (who were described as Trustees named in the Settlements made previous to and upon the Marriages of the two Daughters of *L. Hampson*, by *Frances*, his late Wife, deceased,) of the other part; after reciting that the Sum of 5,000 *l.*, the net money arising from the sale of the part of the settled Estates in the County of *Bedford* comprised in the Settlement made upon the Marriage of *L. Hampson*, with *Frances*, his late Wife, was paid to and received by *Hampson*, and was then in his hands, as he thereby admitted and acknowledged, and that *Hampson*, previous to the Marriages of his Daughters, *undertook and agreed to execute a Mortgage, to Filmer and Gilpin, of the Messuages, Lands and Hereditaments thereafter mentioned and described, for securing the payment to them of the said Sum of 5,000 l. upon the Trusts and for the purposes of the Settlements made previous to the Marriages of his said Daughters: It was witnessed*

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that, in consideration of the Premises, and for better securing the repayment of the 5,000*l.* to *Filmer* and *Gilpin* upon the Trusts and for the Purposes aforesaid, *Hampson* demised to them, all his Messuages, Lands, Hereditaments and Real Estates whatsoever, situate in the Parishes of *Luton* and *Caddington*, in the County of *Bedford*, then in the possession or occupation of him and his Tenants, for the Term of 500 years, subject to redemption on payment by *Hampson*, to *Filmer* and *Gilpin*, of the Sum of 5,000*l.*, with lawful Interest for the same from thenceforth, upon the Trusts and for the Purposes aforesaid; and *Hampson* covenanted with *Filmer* and *Gilpin*, to pay to them the 5,000*l.* and Interest accordingly: and, by a Bond of even date, he became bound to them in 10,000*l.*, conditioned for payment of the 5,000*l.* with lawful Interest, on the 18th of July then next.

In March 1824 *Hampson* died insolvent and intestate; and a Suit was shortly afterwards instituted, by two of his Creditors on behalf of themselves and his other Creditors, to have his Estate applied in Payment of his Debts. The usual Decree having been made, Sir *John Filmer* and *Richard Gilpin*, claimed, before the Master, to be paid the 5,000*l.* secured by the Bond and Mortgage, as a Debt due from the Testator at his decease.

Sir *J. Filmer* made an Affidavit in support of the Claim, stating that *Hampson* was, at his death, indebted to him and *Gilpin* in 5,000*l.*, being the net Money arising from the Sale of part of the Estates comprised in *Hampson's* Marriage Settlement, which was paid to and received by him; in consideration whereof he agreed to

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Scott.

execute the Bond and Mortgage, for securing the repayment thereof to *Filmer* and *Gilpin* as Trustees of the Settlements made on the Marriages of his Daughters, upon whom the Estates would have descended if they had not been sold, and that he executed the Bond and Mortgage in pursuance of that Agreement ; and that the 5,000 *l.*, with interest *from Hampson's death*, remained due from his Estate.

It appeared, by the Evidence in opposition to the Claim, that the Bond and Mortgage were privately prepared by *Hampson* himself, and were in his own handwriting ; that they were executed by him in his private Office, and when no one was present except himself and the Clerk who attested his execution ; that, a few days after his death, they were found in an Iron Chest, in his Bed-room, containing the Title-deeds relating to the Mortgaged Premises and other Estates, which were tied up in bundles separate from the Bond and Mortgage-deed ; and that, before *Hampson's* death, the existence of those Instruments was not known to the Persons to whom they were executed, or to any of the Persons interested under the same : and one of the Witnesses, who had been a Partner with *Hampson* in his Banking business, deposed that, on the 18th of December 1812, *Hampson* was indebted to certain Persons in Sums amounting to 3,600 *l.*, which still remained unpaid, and that, on the same day, *Hampson*, as the Witness believed, was insolvent.

The *Master* having reported that the Bond and Mortgage were, in his opinion, void against *Hampson's* Creditors, *Filmer* and *Gilpin* excepted to the Report.

Sir *E. Sugden* and Mr. *Thompson*, in support of the
Exceptions :

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At the time when *L. Hampson* executed the Bond and Mortgage-deed, he had received the whole of the Trust-money ; and he had in his hands 5,000 *l.* part of it. By getting the Fund into his possession, he constituted himself a Trustee of it. It was ear-marked as a Trust Fund : no Creditor could have claimed it. The moment that he assumed the character of a Trustee, this Court would give legal validity to all acts done by him, which he might have been compelled to do. By the Settlement of 1786, the Monies, until they were reinvested in the purchase of Lands, were to be laid out on Government or Real Securities ; and *Hampson* having the Money in his hands, and before he dealt with it gave a real Security accordingly. His assets were increased by the amount of the Money for which he gave the Security ; and his Creditors have had the full benefit of it. As there was a Legal and Equitable obligation to do the act, and a sufficient consideration, it cannot be said that the Deed was voluntary : therefore the evidence that *Hampson*, when he made the Mortgage, owed Debts to the amount of 3,000 *l.* or 4,000 *l.*, which are still unpaid, is of no importance.

Sir *John Filmer*, in his Affidavit, states that *Hampson*, in consideration of his being indebted to him and *Gilpin* in respect of the 5,000 *l.*, agreed to execute the Bond and Mortgage to them ; and that he executed the Bond and Mortgage in pursuance of such Agreement ; and the Deed recites that *Hampson* had so agreed. The mere circumstance that he retained the Deed in his custody,

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does not affect its validity. *Lush v. Wilkinson* (a);
Doe v. Knight (b).

Mr. *Knight* and Mr. *Turner*, for the Plaintiffs,
 in support of the Report:

There are two questions in this Case: 1st. Whether the delivery of the Deed was sufficient to constitute it a complete Deed: 2d. Whether it is not void under 13 Eliz. c. 5.

A Deed, although formally sealed, delivered and attested, may be an Escrow. Both the old and the modern Cases have decided that, upon all the circumstances of the Case taken together, it is a question for a Jury whether there has been a complete delivery of a Deed. *Johnson v. Baker* (c). That Case proves that, though nothing is said by a Party to a Deed at the time of execution, he is not precluded from showing that it was not finally executed as a complete and perfect instrument. *Murray v. Lord Stair* (d). If the intention of the Grantor in this Case, when he executed the Deed and placed it in his Chest, was to retain it in his own power, the effect will be the same as if he had executed the Deed conditionally. *Doe v. Knight* only shows that the circumstances of that Case did not warrant the conclusion of the Jury. That Case is plainly distinguishable from this. Here the Deed was prepared and engrossed by the Grantor himself, and was executed by him in the presence of his Clerk only, (no Person intended to be benefited being privy to it,) and was kept by him in his Chest till his death. In

(a) 5 Ves. 384.

(b) 5 Barn & Cress. 671.

(c) 4 Barn. & Ald. 440.

(d) 2 Barn. & Cress. 82.

See particularly pages 87, 88.

in 5 Ves & Ald. 718.

Doe v. Knight, the Deed was delivered to a third Person, and placed out of the control of the Grantor, with a declaration that it belonged to the Grantee. Here the Deed never was out of the custody of the Grantor. In *Naldred v. Gilham* (e), there was no circumstance beyond the retainer of the Deed. The decisions in *Boughton v. Boughton* (f), and *Birch v. Blagrove* (g), proceeded upon the particular circumstances of those Cases.

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The first Decree in this Cause, was the usual Decree in a Creditor's Suit, directing merely the common inquiries. *Filmer's* Affidavit was carried in by him, as a mere ordinary Creditor, under that Decree. The *Master*, in his Report, stated the special circumstances of the Claim, without coming to any conclusion as to its validity or invalidity. Then a subsequent Decretal Order was pronounced, directing, specifically, the *Master* to inquire and state whether the Mortgage and Bond were valid. It is clear that no such agreement as is stated by *Filmer*, could have been made. He does not say that there was any agreement with him, but only that it was agreed: and the Evidence proves that there could have been no communication between him and *Hampson*.

The Mortgage Deed is very informally prepared. No day of payment is mentioned in the Proviso for Redemption; and, though there is notice of the Trusts, no Power to give Receipts is vested in the Mort-

(e) 1 P. W. 577. But see the observations of *Bayley J.* on this Case in 5 Barn. & Cress. 690. 3 Mer. 271.

(f) 1 Atk. 625. (g) Amb. 264.

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gagees. The 5,000 *l.* is made to carry Interest from the date of the Deed, although *Hampson* was entitled to a Life Interest in the Estates.

By the 6th Sect. of 13th Eliz., a Conveyance will not be valid as against Creditors, unless it be made *bond fide* and for valuable Consideration. A valuable Consideration, or *bona fides* alone will not do; they must both concur. Now here the Deed was secretly and informally made, and it contains a false recital. *Twyne's Case* (*h*). *Doe v. Knight* (*i*). The Grantor remained in possession of the Property comprised in the Mortgage, and he was in a state of Insolvency at the time. He did not part with the Deed, but kept it in his possession for 12 years. A Court of Equity, therefore, would not have compelled him to deliver up the Title-deeds to the Mortgagees, but would have said that the Deed was an incomplete instrument. *Dewey v. Bayntun* (*k*), *Pickstock v. Lyster* (*l*).

It was said that *Hampson* did not touch the Money until he had executed the Mortgage; but it appears, by the Evidence, that, before August 1812, he had possessed himself of Sums amounting to 4,927 *l.*, exclusive of the 5,000 *l.*

Mr. Rolfe and Mr. Barber, appeared for *Hampson's* Personal Representatives.

Sir *E. Sugden*, in reply:

The Mortgage Deed was not an Escrow. Nothing was to be done to precede its operation; but it was

(*h*) 3 Co. Rep. 80.

(*k*) 6 East. 257.

(*i*) See 5 Barn. & Cress.

(*l*) 3 M. & S. 371.

intended to operate from its execution. The Proviso for Redemption is quite correct: for *Hampson* was liable to be called upon to pay the Money at any time, and, therefore, he could not limit the time of Payment. If he was not called upon, he, being Tenant for Life, had the whole of his Life to pay it. A voluntary Deed can not be affected under the 13th Eliz., unless the Grantor, when he executed it, was indebted to the extent of insolvency: here the Grantor continued in a state of solvency for 12 years after he executed the Deed.

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The VICE-CHANCELLOR :

I take it to be proved that the Mortgage-deed was sealed and delivered by Mr. *Hampson*; and, therefore, it is good, unless it is shown either that there was fraud connected with the execution of it, or that it was intended to be delivered as an Escrow: but, in the latter case, there must be circumstances to show that the Deed was intended to take effect conditionally, and not absolutely.

Upon the Developement of all the circumstances of the Transaction, there is no circumstance with respect to which this Deed can be considered to have been delivered as an Escrow: there is no Evidence to show that it was not intended to operate, immediately, as a security for the 5,000*l.* which *Hampson* had received. The Law then is, *primâ facie*, in favour of the Ex-ceptants.

With respect to the recital that *Hampson* had agreed to execute the Mortgage, that recital is a mere matter of course: and, as he had received the 5,000*l.*, that circumstance would justify the security; and, conse-

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quently, that mere recital, though it was not founded in fact, would not invalidate the Deed.*

It appears, from the *Master's* Report made in pursuance of the Decree on the hearing of the Cause, that I am not at liberty to infer that *Hampson* was in a state of insolvency at the time when he executed the Security; for it appears that he was then indebted to the amount of 3,000 *l.* or 4,000 *l.* only. There being then nothing to show either inability to grant the Security, or Fraud, here, I have the fact that the Deed was sealed and delivered; and then I have the authority of the Law for saying that the mere retainer of the Deed, will not affect its validity.

Exception allowed.

1833:
26th February.

Will.

Revocation.

A Testator devised all his Real Estates to his Children equally, and, afterwards, entered into Contracts for the sale of his Estates, but died before they were

TEBBOTT v. VOULES.

WILLIAM VOULES, by his Will dated the 17th of February 1827, devised his Real and Personal Estates to all his Children, except *James Parker Voules*, their Heirs, Executors, Administrators and Assigns, as Tenants in Common. The Testator died in November 1828, leaving 13 Children him surviving, five of whom were Infants.

The Bill, which was filed by his simple-contract Creditors, in June 1830, stated (amongst other things) that The Purchasers afterwards abandoned their Contracts, because they were unable to procure a Conveyance from some of the Devises who were Infants. Held that, though the Contracts were properly abandoned, the Will was revoked as to the Premises therein comprised.

the Testator, subsequently to his Will, had entered into Contracts with different Persons, for the Sale to them of the greater part of his Estates, and which Contracts were subsisting and binding at his death, but none of them had then been completed. It prayed that, if the Testator's Personal Estate should not be sufficient to pay his Debts and Funeral Expenses, it might be declared that his simple-contract Creditors were entitled to have such of his Real Estates as were contracted to be sold, or the Purchase-monies for the same, applied to increase his Personal Estate for the benefit of his Creditors, and that the same might be applied accordingly; and, if it should appear that any of the Contracts had been abandoned and the Deposit Monies returned, that the Premises comprised in those Contracts might be resold, for the benefit of the simple-contract Creditors, to increase the Personal Estate.

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The Decree made on the hearing of the Cause, directed the *Master* to inquire what Real Estates the Testator was seised of, and what Contracts he had entered into for the Sale of any and which of his Estates, and which of such Contracts were subsisting and binding at his Death, and which of the Purchasers were willing to perform their Contracts; and which of them refused to perform their Contracts; and whether any and which of their Contracts had been abandoned since the Testator's death, and by whom, and by whose order and authority, and whether they were, or were not, properly abandoned: but the Decree was to be without prejudice to *any question as to whether any Contracts entered into by the Testator, did or did not operate as a revocation of his Will* as to the Premises comprised in such Contracts.

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The *Master* found that the Testator was, at his death, seised in Fee of divers Real Estates, sſbject, as to the greater part of them, to Contracts, which he had entered into with different Persons subsequently to the Date of his Will, for sale to them of the same as thereafter mentioned: that, on the 25th of June 1828, the Testator caused various parts of his Estates to be put up for Sale, by Auction, in 24 Lots, subject to certain Conditions of Sale, by which it was stipulated, amongst other things, that the Purchaser of each Lot should pay down immediately, into the hands of the Auctioneer, a Deposit of 15 l. per Cent., in part of the Purchase-money, and sign an Agreement for payment of the remainder on or before the 29th of September 1828; and that the Purchaser of each Lot should have a Conveyance of the same, properly executed by the Vendor, upon payment of the remainder of the Purchase-money, and be entitled to the Rents of the parts let, and to Possession of the parts in hand, on and from Michaelmas 1828. The *Master* further found that, at the Auction, three of the Lots were bought in, and that the remainder were knocked down to the several Persons named in his Report; and that they paid, to the Auctioneer, Deposits in part of their respective Purchase-monies, and signed Agreements for payment of the remainder and completion of their Contracts according to the Conditions of Sale; that Abstracts of the Title were delivered to the Solicitors for the several Purchasers, within the Time prescribed by the Conditions of Sale; but that, at the Testator's death, none of the Conveyances were completed, although the Solicitors for some of the Purchasers had prepared their Engrossments, and others had sent the Drafts for perusal by the Vendor's Solicitor, and some

had not completed the investigation of the Title; and that, upon the investigation of the Title, the Purchasers had objected that they could not obtain a Legal Title to the Entirety, by reason that several of the Co-devisees were Infants, and no efficient Conveyance could be made by them during their Minorities; that, in April 1829, five of the Purchasers named in the Report, demanded and received back their Deposits, and refused to perform their Contracts, but that *G. Baylis*, the Purchaser of Lots 6 & 8, and *T. George*, the Purchaser of the Lots 7 & 10, were both willing to perform their Contracts. The *Master* was of opinion that all the aforesaid Contracts *had been properly abandoned* by all Parties, except the aforesaid Contracts entered into with *Baylis* and *George*, who were willing to perform the said Contracts, and which he was of opinion were *subsisting and binding Contracts at the Testator's death*; and that all the Deposits had been properly returned, except those made by *Baylis* and *George*.

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*46 Mad. 53.
Said in P. 326*

Mr. *Treslove* and Mr. *K. Parker*, for the Plaintiffs, said that the Testator's Estate was insufficient for payment of his Debts, and, as he had shown an intention to convert his Real Estates into Personalty, the Court ought to give his simple-contract Creditors the benefit of the Contracts.

Mr. *Preston*, for the Defendant *W. J. Voules*, the Testator's heir:

As all the Contracts were entered into by the Testator after the date of his Will, and were binding at his death, his Will was revoked as to the Premises therein comprised.

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[The *Vice-Chancellor* :—In this Case the Testator had so dealt with the Legal Estate, as to make it impossible that the Contracts could be performed.]

He made his Will before he entered into the Contracts; and, by those Contracts, he revoked his Will. It is enough for me to contend that he died in such a state that there were Contracts binding upon him. An Act of Parliament might have been obtained in order to procure a Conveyance from the Infants. *Whittaker v. Whittaker* (a); *Broome v. Monck* (b); *Knollys v. Alcock* (c); *Bennett v. The Earl of Tankerville* (d). In this last Case Sir *W. Grant*, M. R. says: "The question must now be decided, as if it had arisen the day after Lord *Tankerville's* death. If, at that period, the Will stood revoked, with regard to these Lands, by his death, how by any subsequent event, can that Devise again become operative and effectual? Even if the Contract had been abandoned in the Testator's life, I very much doubt, whether that would have set up the Will again without a Republication; but, being revoked at the time of his death, by a valid, subsisting Contract, it is immaterial to the Devisee what becomes of the Land, his only Title being gone by the Revocation of the Devise."

Mr. *Lovat*, for the Defendants, the Devisees:

The Testator, by his own act, rendered it impossible that the Contracts should be performed; and the *Master* has found that all the Contracts, except those which were entered into with *Baylis* and *George*, have

(a) 4 Bro. C. C. 31.

(b) 10 Ves. 597.

(c) 5 Ves. 648.

(d) 19 Ves. see 179.

been properly abandoned ; the Will, therefore, was not revoked as to the Premises which were comprised in any of the Contracts except those with *Baylis* and *George*. *Eilbeck v. Wood* (e); *Matthews v. Venables* (f).

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TEBROTT
v.
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The VICE-CHANCELLOR :

In *Eilbeck v. Wood*, the Appointment of 1811 was executed by the Wife, after she had exhausted her Power. It was mere waste paper ; and no Interest vested in the Appointee under it.

The question which has been raised in this Case, is quite settled by *Bennett v. The Earl of Tankerville*. If, at the time of the Testator's death, the Contracts were such that the Testator might have enforced them against the Purchasers, or the Purchasers might have enforced them against the Testator, the Contracts were a Revocation of the Will.

Declare that the Contracts entered into by the Testator for the sale of his Real Estates, operated as a Revocation, in Equity, of the Devise of such Real Estates contained in his Will, and that the same descended to the Defendant *W. J. Voules*, as the Testator's eldest Son and Heir-at-Law. Decree the Contracts with *Baylis* and *George*, to be carried into Execution ; and the Defendant, *W. J. Voules*, the Heir-at-Law, consenting to the Sale of the rest of the Estates comprised in the Contracts, for the payment of the Testator's Debts, let the same be sold, and let the Monies arising from the Sales be paid into Court.

(e) 1 Russ. 564.

(f) 2 Bing. 136.

1833:
27th February.

Practice.
Exceptions.

On the hearing of Exceptions to a *Master's* Report, no parts of the Answer can be read, except those which were read before the *Master*.

RANDS v. PUSHMAN.

THIS was a Bill for an Account, against an Executor, seeking to charge him with wilful default; and the *Master*, in taking the Accounts directed by the Decree, had charged him accordingly. The Defendant then excepted to the Report; and, upon hearing the Exceptions, the Plaintiffs were proceeding to read passages in the Answer which had not been read before the *Master*. The Defendant's Counsel objected to the reading of those passages, saying that, on the hearing of Exceptions to a *Master's* Report, no passages in the Answer could be read, which were not read before the *Master*; that though, in this Court, the *Master*, in his Report, referred to the Answer generally, yet, in the Exchequer, the *Master* set out all the passages in the Answer which were read before him.

The *Vice-Chancellor* ruled that such passages only could be read, on the hearing of the Exceptions, as had been read before the *Master*.

Mr. *Knight* and Mr. *Bethell* for the *Exceptions*.

Sir *E. Sugden* and Mr. *Griffith Richards* for the Report.

ROBINSON v. SMITH.

1833:
4th March.

THE Testator in this Cause bequeathed 700*l.* to *M. Smith*, his Executors, &c. in Trust that he, his Executors, &c. should invest the same in the usual Securities, and pay the Dividends and Interest thereof to the Testator's Daughter *Sarah*, the Wife of *M. Smith*, for her separate use, for life, and, after her Decease, in Trust that *M. Smith*, his Executors, &c. should pay the Trust-monies to such Persons as *S. Smith* should by Will appoint, and, in default of appointment, to her *Personal Representatives*.

Will.
Construction.
Husband and
Wife.
Personal Repre-
sentatives.

Sarah Smith died, in her Husband's lifetime, without having made any Appointment of the Fund. Then *M. Smith* died, without having taken out Administration to his Wife; and, after his death, one of her Next of Kin took out Administration to her, and filed the Bill in this Cause, claiming the Fund, against the other Next of Kin and the Executors of *M. Smith*.

Mr. Lovat, *Mr. Koe*, and *Mr. Elderton*, for the Plaintiff, and the other Next of Kin of the Wife.

Mr. Rolfe and *Mr. Hall*, for the Husband's Executors, argued that the words "Personal Representatives," were synonymous with "Executors and Administrators," and that, as a Gift to *A.* for life, and, after his death, to his Executors or Administrators, would give *A.* the absolute Interest, so, under the Trusts declared in this Case, *Mrs. Smith* took an absolute Interest in

Testator bequeathed 700*l.* to his Daughter's Husband, his Executors, &c. in trust to pay the Interest to his Daughter, for her separate use for life, and after her death, to such persons as she should appoint by Will, and, in default of Appointment, to her Personal Representatives. The Daughter died without having made any appointment. Held that her Next of Kin, to the exclusion of her Husband, were entitled to the 700*l.*

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King v. Cleveland 4 Sel. & L. 483. Briggs v. Lupton 7 Ch. 397
Wyndham's Trusts 1 New Rep Eq. 293
Hockdale v. Moulden 4 L. Rep. Eq. 368

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the Fund. *Saberton v. Skeels* (a) ; *Anderson v. Dawson* (b) : that the question arose upon a Will, and not on a Marriage Settlement, which was the Husband's Deed, and, therefore, derogated from his Rights, and was always to be construed against him : that the Testator could not know who the Next of Kin of his Daughter would be, and, therefore, could not intend to benefit them.

The VICE-CHANCELLOR :

The Husband and his Executors are made Legatees of the Fund, merely as Trustees. The Testator considered that his Daughter might die, either in the lifetime of her Husband, or after his death ; and, therefore, he provided that the Husband, or his Executors, should *pay* the Fund. But the Counsel for the Executors contend that they are not to pay, but to retain the Fund. I am, however, of opinion that the Testator intended to give, to the Husband, his Executors and Administrators, nothing but a Trusteeship, and, consequently, that they are excluded from all beneficial Interest in the Fund (c).

(a) 1 Russ. & Myl. 587.

(b) 15 Ves. 532, see 536.

(c) See *Baines v. Ottey*, 1

Myl. & Keen, 465, and see next Case.

STYTH v. MONRO.

1834 :
23d July.

JANE MONRO, by her Will, directed her Trustees to convert all her Real and Personal Estate into Money, and disposed of the same, when so converted, as follows :
“ I give and bequeath, unto every one of my Uncles, Brothers of my late Father, 20*l.* each, or their respective Representatives : I give and bequeath, unto every one of my Aunts, sisters of my late Father, each 20*l.*, or their respective Representatives. And all the rest and Residue of the said Money or Trust Estate I give and bequeath as follows, (that is) I give and bequeath, unto the respective Representatives of the Sisters of my late Grandfather *E. Fox*, one Half-part or Share of my said Rest and Residue of Money or Trust Estate, namely, one Moiety of the said Half-part to the Representatives of *Bridget*, Sister of my said Grandfather, the other Moiety to the Representatives of *Elizabeth*, Sister of my said Grandfather ; and I give and bequeath unto the Descendants of the late *James Atkinson*, Brother of my late Grandmother, *Jane Fox*, the other Half-part or Share of my said Rest and Residue of Money or Trust Estate, namely, One-third of the said Part or Share, to the Representative or Representatives of *Mary*, Daughter of the said *James Atkinson* ; one other Third of the said Part or Share, unto the Representatives of *Betty*, Daughter of the said *James Atkinson* ; the other remaining Third of the said Part or Share, to the Representatives of *Joyce*, Daughter of the said *James Atkinson*.”

Will.
Construction.
Representatives.

The word “ Representatives,” in a Will, construed to mean “ Descendants,” the context requiring it.
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Atkinson v Crowther 19 Decr. 453.

Stoddell v. Ingham 42 Rep. 22. 367

1834.

STYTH
v.
MONRO.

The Bill was filed, by the Administrator of the Testatrix with her Will annexed, (who was one of her Next of Kin,) against her Co-heirs and certain Persons claiming to be the Next of Kin of two of the Sisters of *E. Fox*, praying that the Will might be established, the Trusts performed, and the Rights and Interests of the Plaintiff and all other Parties, to and in the Testatrix's Residuary Trust Estate, ascertained and declared.

Mr. *Knight* and Mr. *Simons*, for the Plaintiff, said that it appeared, by the Context of the Will, that the Testatrix, by "Representatives," meant "Descendants." And,

The *Vice-Chancellor*, being of that opinion, referred it to the *Master*, to inquire and state how many Brothers and Sisters the Testatrix's late Father had, and whether they were living or dead, and, if they were dead, when they respectively died; and whether *Bridget* and *Elizabeth*, the Sisters of the Testatrix's Grandfather, *E. Fox*, and *Mary*, *Betty* and *Joyce*, the Daughters of *James Atkinson*, the Brother of the Testatrix's Grandmother, *Jane Fox*, or any and which of them were living or dead; and, if dead, when they respectively died, and what Descendants they had respectively living at the Decease of the Testatrix, and in what degrees, and whether any and which of such Descendants had since died, and who were their respective Personal Representatives (*a*).

Mr. *Wilbraham* appeared for the Defendants.

(*a*) See the preceding Case.

HOARE v. PECK.

THE Plaintiff sought, by his Bill, to be compensated, by the Defendants, for the Loss he had sustained on the Sale of a quantity of Spices, which he alleged he had been induced to purchase by the fraudulent representations of the Defendants. It appeared, on the face of the Bill, that the Plaintiff purchased the Spices in March 1826, and that he discovered the alleged Fraud in July 1829; but he did not file his Bill until February 1833.

The Defendants put in a general Demurrer.

Sir *E. Sugden* and Mr. *Teed*, in support of the Demurrer, relied on the Statute of Limitations, and said that, if a Party came into a Court of Equity on the ground of Fraud, the Court would not relieve him, if he had discovered the Fraud for a considerable time before he filed his Bill.

Mr. *Pepys* and Mr. *O. Anderdon*, in support of the Bill, said that the time did not begin to run until the discovery of the Fraud: *Booth v. The Earl of Warrington* (a); *Bright v. Eynon* (b): and that the Statute of Limitations must be taken advantage of by Plea, and not by Demurrer.

The VICE-CHANCELLOR:

It is competent to a Court of Equity, in cases like

(a) 4 Bro. P. C. 163.

(b) 1 Burr. 391.

France v. Symonds 1 Kay 680.

1833:
9th March.

Pleading.
Demurrer.
Statute of Limitations.

Where it appears, on the face of the Bill, that the Cause of Suit accrued more than six years before the filing of the Bill, a Defendant need not plead the Statute of Limitations, but may Demur.

3. J. & G. 268
5 B. & C. 57.

Argus v. Crawley
10 T. D. 37

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HOARE

v.

PLCK.

the present, to determine whether it will itself interfere, or leave the Party to his remedy at Law.

It appears, on the face of the Bill, that, in 1829, the Plaintiff was fully apprized of his Loss; and yet he did not file his Bill until February 1833. Why, therefore, should he not be left to his remedy at Law? I cannot, however, but think that it has been decided that, where it appears, on the face of the Bill, that the Cause of Suit arose more than Six Years before the filing of the Bill, the Defendant may Demur(c).

My opinion is that the Cause of Action accrued the moment the Money was applied in Payment for the Goods, and that the subsequent Discovery of the Fraud has nothing to do with it. *4 38 & Ald. 626. 5 B & C 259 38 & Ald 208*

Demurrer allowed.

1833:
12th March.

Will.

Construction.

Testator bequeathed the remainder of his Property to his Sister, *A. B.*, to dispose of amongst her Children as she might think proper. Held that *A. B.* took no interest in the Residue.

BLAKENEY v. BLAKENEY.

EDWARD NEWCOME, made his Will, dated the 25th of February 1817, as follows: "I give and bequeath to my dear Mother, *Anna Maria Newcome*, the entire of my Property which I derive under my Father's Will, or which in any other way I should or shall be possessed of, recommending my dear Mrs. *Elizabeth Harvey* to be amply provided for by her. It is my request, should my Mother survive me, that she will leave 500*l.* a piece to each of my Sister *Jemima's* three Daughters, and 1,000*l.* to *Alicia Blakeney's* eldest

(c) See *Foster v. Hodgson*, 19 Ves. 180; *Earl Deloraine v. Browne*, 3 Bro. C. C. 633, and the Authorities referred to in Mr. *Bell's* Note to that Case.

Daughter; 500*l.* to Mrs. *E. Harvey*; and the remainder of my property to my Sister *Alicia Blakeney*, to dispose of amongst her Children as she may think proper.

1833.
BLAKENEY
v.
BLAKENEY.

The Testator died in March 1821, leaving his Mother surviving him. She died in March 1828.

The Bill was filed in May 1832, by the four Sons of *Thomas* and *Alicia Blakeney*, all of whom were adult, and the question was whether *Alicia Blakeney* took a Life-interest under the Residuary Bequest in the Testator's Will.

Mr. *Girdlestone*, jun., for Mr. and Mrs. *Blakeney*, cited *Burrell v. Burrell* (a).

Sir *E. Sugden*, Mr. *Jacob* and Mr. *Blunt*, appeared for the other Parties.

THE VICE-CHANCELLOR :

I confess it seems to me that, by the words of the residuary Bequest, no Interest is given to *Alicia Blakeney*.

Declare that the Defendant *Alicia Blakeney* has no Interest in the Testator's Personal Estate.

(a) Amb. 66o.

1833 :
13th and 15th
March.

Will.
Construction.

Testatrix devised all her Messuages situate in *Denmark-court*. She had five Houses situate in the Court, and another which fronted towards the *Strand*, and formed one side of a covered Passage leading to the place where the five were situate, and which had attached to the back of it, an Outbuilding abutting on ground in *Denmark-court*. Held that the Five Houses only passed.

NEWTON v. LUCAS.

KITTY LEVY NEWTON, by her Will dated the 12th of August 1823, devised, to Trustees, all those her Freehold Messuages, Lands, Tenements and Hereditaments, situate and being in *Denmark-court*, *Haydon-square*, *Hennage-lane* and *Booker's-gardens*, to hold to them, their Heirs and Assigns, upon Trust, out of the Rents, to pay certain Annuities, and, subject thereto, to hold the said Messuages, Lands, Tenements and Hereditaments in *Denmark-court* and *Haydon-square*, upon the Trusts therein mentioned.

The Testatrix was seised of five Freehold Houses, numbered 15, 18, 19, 21 and 22, which were admitted to be situate in *Denmark-court*. She was also seised of another Freehold House, numbered 383, situate in, and fronting towards, and having its principal entrance on the North side of the *Strand*, and having adjoining to it, at the back, an Outbuilding, of much lower elevation than the House, and appearing to have been built after it. This Outbuilding was used as a Bakehouse, and one end of it abutted on ground admitted to be in *Denmark-court*. A narrow way or passage, which appeared to have been made through the ground-floors of the House numbered 383 and the adjoining House numbered 382 in the Strand, and which was covered by parts of the first floors of those two Houses, led, northwards, from the *Strand* to the place in which the five Houses were situate, and was much narrower than that place. The House numbered 383, had a side door

Kings College Hospital v Whieldon 18 Deas. 32.

(which was not numbered) opening into the Passage; and the words, "*Denmark-court*" were painted on the Walls or Door-posts of the Houses numbered 382 and 383, at the Entrance of the Passage nearest the *Strand*, and also on the House numbered 21, which was next beyond the Bakehouse.

1833.

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 v.
 LUCAS.

All the Houses admitted to be in *Denmark-court*, were uniform in structure; but differed, in that respect, from the House numbered 383, and were greatly inferior to it in elevation and size.

The Houses numbered 382 and 383, and those to which the Passage led, had all formerly been one entire Estate; and Numbers 382 and 383 were described in the Title-deeds and Leases, and in the Assessments to the Land-tax and Poors'-rates, as situate in the *Strand*, and the others, as situate in *Denmark-court*.

The Estate afterwards became joint Property, and the Proprietors having agreed to make partition, Number 383, which was described, in the Award, as situate in the *Strand*, and Numbers 15, 18, 19, 21 and 22, as in *Denmark-court*, were allotted to the Person under whom the Testatrix claimed; and Number 382, which was described as in the *Strand*, and the rest of the Houses, which were described as in *Denmark-court*, were allotted to the other joint Proprietor. The Letters to and from the Occupiers of Number 383, were directed to and dated from the *Strand*, and they were described, in Deeds and in their Cards of Address, as being resident there.

The only instance in which Number 383 was differently described, was in an Agreement which the Testa-

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trix entered into, in 1825, to grant a Lease of that House to *W. Ward*, in which it was described as situate in *Denmark-court-passage*, but *Ward*, who was then in the occupation of the House, was described, in the Agreement, as of the *Strand*.

The Plaintiff's Witnesses represented *Denmark-court* as consisting of the Passage as well as the place into which it opened on the North; and one of them said that all the six Houses were known to the Testatrix as, and called by her, "Her *Denmark-court* Houses:" but, in a Map or Plan, which they said was a correct Map or Plan of *Denmark-court* and the Houses, Streets and Places adjacent thereto, the House numbered 382, was omitted.

The Defendant's Witnesses described *Denmark-court* as consisting only of the Place into which the North end of the Passage opened.

The Bill was filed by Parties beneficially interested under the Will, against the Testatrix's Heir and certain other Persons, praying to have the Will established and the Trusts performed.

The principal question in the Cause, was whether the House numbered 383, passed under the before-mentioned devise.

Mr. *Pepys* and Mr. *Wigram*, for the Plaintiffs:

The question in this Case, is not between two conflicting Descriptions, but between one Description and an Intestacy. The House in question might, with equal, or, perhaps, greater propriety, be described as in

the *Strand*; but it cannot be denied that the description in the Will does, in some degree at least, apply to it. The House was used as a Baker's Shop; and it is admitted that the Bakehouse abutted upon *Denmark-court*. The words "*Denmark-court*" were written upon the sides of Numbers 382 and 383, at the entrance to the Court from the *Strand*.

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It appears, from the Agreement which the Testatrix entered into with *Ward*, that she did not describe the House as being in the *Strand*. If the description is not sufficient, by itself, to pass the House, then, as it is clear that the description does, in some sort at least, apply to it, the Evidence that the Testatrix called the Houses her *Denmark-court* Houses, is admissible. *Miller v. Travers* (a); *Beaumont v. Fell* (b); *Selwood v. Mildmay* (c); *Price v. Page* (d); *Hampshire v. Peirce* (e); *Thomas v. Thomas* (f).

Sir E. Sugden, Mr. Garratt and Mr. Jacob, for the Defendant, the Heir-at-law of the Testatrix :

The Evidence that the Testatrix called the Houses, her *Denmark-court* Houses, is not admissible. Evidence cannot be given to show that the Testatrix considered Property not coming within the description which she has used, as included in it. *Doe v. Oxenden* (g). The same point was established in *Miller v. Travers*. You cannot go into Evidence as to the use of Language by a Testatrix,

(a) 8 Bing. 244.

(b) 2 P. W. 141.

(c) 3 Ves. 306.

(d) 4 Ves. 680.

(e) 2 Vez. 216.

(f) 6 T. R. 671.

(g) 3 Taunt. 147, and 4 Dow, 65.

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contrary to its known import. In the Title-deeds, and, especially, in the Conveyance to the Testatrix, and also in the Assessments to the Land-tax and Poor-rate, the House in question was described as in the *Strand*, and the other Houses, as in *Denmark-court*. The Persons resident in the House, always described themselves as of the *Strand*. *Doe v. Greening* (*h*); *Doe v. Lyford* (*i*) *Doe v. Pigott* (*k*). The Passage could not be part of the Court; for it was cut through the ground-floors of the two Houses in the *Strand*: and, though there is some Evidence that the words "*Denmark-court*," were written on the side of the Passage, yet that Evidence is not clear or satisfactory; and we have proved that the same words were written on Number 21 in the Court.

Besides, there is sufficient Property to answer every word in this Will: and, if the Court cannot say that it is certain that this House passed, the Heir must take it, for he cannot be disinherited by doubtful words. *Doe v. Roberts* (*l*); *Doe v. Bower* (*m*).

Mr. *Pepys*, in reply:

None of the Cases that have been cited, are applicable. In *Doe v. Oxenden*; *Miller v. Travers*; *Doe v. Pigott*; *Doe v. Bower*; *Doe v. Greening*; and *Doe v. Lyford*; there was Property that answered the description, and other Property to which it was totally inapplicable. Words of local description were used, and there was Property to which that description was

(*h*) 3 M. & S. 171.

(*i*) 4 M. & S. 550.

(*k*) 7 Taun. 553.

(*l*) 5 Barn. & Ald. 407.

(*m*) 3 Barn. & Adol. 453.

See Wigram on Extrinsic Evidence, 54, *et seq.*

correctly applicable, but it was totally inapplicable to the Property in dispute ; and, consequently, the evidence tendered went to contradict the Will. *Doe v. Roberts* is in our favour ; for it shows that it is not necessary to use the most correct description of Property, provided words are found which are sufficient to include it. The question is, whether the House is so situated that it *may* have the description of a House in *Denmark-court*. In *Miller v. Travers* there was no description applicable to the Property in question, and, therefore, it was held not to pass. If the words which a Testatrix has used in describing her Property, are applicable to it, in some sort, though incorrectly, the Property will pass. Our Witnesses prove that the place in question was called *Denmark-court* down to the opening of the Passage into the *Strand*: they all include the Passage as part of the *Court*.

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Great stress has been laid upon the fact that "*Denmark-court*" was written upon Number 21. In every Street of any extent in *London*, the name of the Street is written on the different Divisions of it. There was a break in the Court, and, therefore, the Name was repeated. The Tenant of Number 383, has been examined as a Witness for the Defendants ; but they have not ventured to ask him whether "*Denmark-court*" was or not written on the side of his House. We do not deny that the House was in the *Strand*, but we say that it was also in *Denmark-court*. Indeed the greater part of the House was in *Denmark-court* ; and it is not even disputed that the Bakehouse, which was attached to the House, was in the Court. *Ward* and the other Tenants of the House, say that they described themselves as of the *Strand* ; but they might also have

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described themselves as of the Court. A Person who lives in a House, which is situate at the corner of a Square and of a Street, may describe himself as being either of the Square or of the Street.

If the Testatrix had had no House except the one in question, there can be no doubt, and indeed it has been admitted, that it would have passed; and, if that be so, the Evidence that the Testatrix called the Estate her "*Denmark-court Houses*" is admissible. *Wigram on Extrins. Evid.* 76, *et seq.* We, therefore, submit that there is sufficient in this Case, to authorize the Court to hold that the House Number 383, passed by the Devise in question.

THE VICE CHANCELLOR:

In this Case the question is, what Property passed by the following devise in the Will of *Kitty Levy Newton*: "I give and devise all those my Freehold Messuages, Lands, Tenements and Hereditaments, situate and being in *Denmark-court*, *Haydon-square*, *Hennage-lane* and *Booker's-gardens*."

It is admitted that the Testatrix had Five Freehold Messuages in *Denmark-court*: and she had another Messuage with respect to which the question is whether it was, in fact, situate in *Denmark-court*, or, if it were not in *Denmark-court*, whether it was not so treated, by others and by her, as to be capable of passing, with the other Five, under the description of "My Freehold Messuages, Lands, Tenements and Hereditaments, situate in *Denmark-court*."

There is no great difficulty in ascertaining what is the rule of Law upon questions of this kind. If a Tes-

tator devises Property by a description which completely tallies with it, you are not at liberty to say that some other Property than that with which the description tallies, passed by the Devise.

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In *Doe v. Greening* (a), the Testator gave all his Messuages, Lands and Tenements at *Coscomb*, in the County of *Gloucester*; and it was attempted to give evidence that a portion of his Property, called *Farmcott*, was formerly united to, and had been, ever since, enjoyed with the Estate at *Coscomb*, in order to show that it passed by the Devise. It was nevertheless held that, inasmuch as the Testator had an Estate at *Coscomb*, Evidence was not admissible to show that, under that description, Property not at *Coscomb* passed. But where a Testator gives Property by a description which is not strictly applicable, Evidence is admissible to show what he meant by the words which he has used. Thus, in *Doe v. Roberts* (b), a Testator, who had, by his Marriage Settlement, settled all his Property in the County of *Flint*, so that he had in himself the Reversion in Fee in default of Issue by his Wife, by his Will, after reciting the Settlement and that he had no Issue by his Wife, devised as follows: "I give and devise all the said Capital and other Messuages, Lands, Tenements and Hereditaments, with their Appurtenances, in manner and form following." So that, in the first place, there was a clear intention to pass all the Property that was comprised in the Settlement. And he then said: "That is to say, as concerning all that Messuage situate in *High-street*, in the Town of *Holywell*, in the County of *Flint*, wherein my Mother inhabits, and nearly opposite the *White Horse Inn*, together with the Shop adjoining

(a) 3 M & S. 171.

(b) 5 Barn. & Ald. 407.

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the same Messuage, and all and every my Buildings and Hereditaments in the same Street, I give and devise he same unto and to the use of my said Mother, for her natural life." It appeared that the Testator had a Capital Messuage in *High-street*, which his Mother inhabited, and that there was an entrance, under an Archway, out of *High-street*, to a Court behind it, in which there were, on the side of it fronting the back of that Messuage, two Cottages; and the question was whether those Cottages passed. It is observable that there was nothing to which the words, "and all and every my Buildings and Hereditaments in the same Street," could apply, except the Cottages, which were part of the settled Property; and it was held that those Cottages did pass under that description, though, in strictness, it was not a correct description of them.

In the present Case, I have first to consider whether the words which this Testatrix has used, can be held to include the Messuage in question, having regard to the Evidence of one of the Plaintiff's Witnesses who has deposed that all the Six Messuages were known to the Testatrix, and called by her by the name of her *Denmark-court* Houses. She has not, however, used that name in making this devise; for she has used the terms "my Freehold Messuages, Lands, Tenements and Hereditaments, situate in *Denmark-court*."

With respect to the other Evidence, it stands thus: Several Deeds, the earliest of which is dated in 1789, have been produced, from which it appears that two Houses, described as Numbers 382 & 383 in the *Strand*, and several Houses in *Denmark-court* all belonged, as one property, to one Person; and that they afterwards

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LUCAS.

became joint Property, and a partition was made by which the House Number 383, which is the subject of the present dispute, was allotted, as a House in the *Strand*, along with the Five Messuages which are unquestionably in *Denmark-court*, to the Person under whom the Testatrix claimed, and that the other portion of the Property was allotted, by the description of the House Number 382 in the *Strand*, together with the rest of the Houses in *Denmark-court*, to the other joint-owner. A Lease was made in the year 1799, by which the House in question is described as "all that Messuage or Tenement, Bakehouse and Premises, situate and being in the *Strand*, in the Parish of *St. Martin's in the Fields*, in the County of *Middlesex*, with their and every of their Appurtenances, Number 383," and that description, it must be observed, included the Bakehouse as being in the *Strand*: and an Assignment of the same Premises, made in 1808, contains precisely the same description: and, in the Deed by which the Property was conveyed to the Testatrix, Number 383 is described as in the *Strand*. Then the Testatrix, herself, agreed to grant a Lease to a Person of the name of *Ward*, whose Evidence shows that he was in the occupation of the House at the time; because he states that he had lived in the House for more than 22 years, which covers the time at which the Agreement was made. That Agreement was made between *Kitty Levy Newton* of the one part, and *William Ward, of the Strand*, in the County of *Middlesex*, Baker, of the other part, (but he was no otherwise of the *Strand* than as being an Inhabitant of the House in question,) and she agrees that she will demise to him, all that Messuage or Tenement, Number 383, situate and being in *Denmark-court-passage* in the *Strand*, in the said County of *Middlesex*.

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v.
LUCAS.

And, with respect to this part of the Evidence, the following observation is applicable, which Mr. Justice *Holroyd* makes in the Case of *Doe v. Roberts*, where he is speaking of the Cottages which were behind the *High-street*: "The only way to these Cottages was through the *High-street*, and there was no thoroughfare through *Bakehouse-lane*. If there had been an opening, from the *High-street*, to these Two Cottages alone, they would clearly be in the same Street." And the learned Judge certainly seems to consider that the Passage which led to the Cottages from the Street, might be considered as part of the Street itself.

Then there is Evidence produced which shows that *Denmark-court* ran, at right angles, from the North side of the *Strand*, and that then there was a turning in it, so that it was continued in a line parallel to the North side of the *Strand*. And it is proved that there was a covered Passage which led from the *Strand* to the place in which the Five Houses which indisputably were in *Denmark-court*, were situated: and it is also proved that, at the Entrance of the Passage, on the East side of it, there was painted, "*Denmark-court*," and that, on the posts of the Door which opened from the covered Passage into the House Number 383, (which House formed the West side of the Passage,) the same words were painted. Two or three of the Plaintiff's Witnesses certainly speak of the Passage itself as being part of *Denmark-court*. It is, however, observable that the same Witnesses speak of the Map that has been produced, as being a true and correct Map or Plan of *Denmark-court* and of the Houses, Streets, and Places adjacent thereto; but that Plan, which, according to their representation, is a Plan of *Denmark-court* and of the Houses, Streets

and Places adjacent thereto, omits altogether, as one of the Houses adjacent thereto, the House Number 382, which was on the East side of the Passage ; and, consequently, they represent the Passage as being no part of the Court.

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v.
LUCAS.

I cannot but think that the weight of Evidence is vastly in favour of the fact that Number 383 was no part of *Denmark-court*. For, in addition to the Deeds, there are the Rates and Assessments to the Land Tax and the Poors' Rates, (which are the most authoritative declarations as to situation,) in all of which there is a marked distinction made between Number 383 as being in the *Strand*, and the other Houses, which were unquestionably in *Denmark-court*.

For the purpose of determining whether a House is in one Street or in another, the structure of the Buildings ought to be considered. The Houses numbered 382 and 383 have corresponding roofs, and the backs of them extend Northwards. The Houses in *Denmark-court*, which were all uniform Buildings, were of an inferior description, and of a different construction ; and, if they had any outlet, it extended Westward, which was in a different direction from the outlet of the other two Houses, and the gable end of the Southward House in the Court, fronted the back of the House Number 383, and had its own front turning towards the East. If, therefore, any Person walking along the *Strand*, had been asked whether the House Number 383 was in the *Strand* or in the Court, he would have said that it was in the *Strand*, and not in the Court.

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NEWTON

v.

LUCAS.

It is also a remarkable circumstance that, notwithstanding the words "*Denmark-court*," were written on the side of Number 383, under the covered Passage, there is no Evidence to show that the Door which opened into the Passage, was numbered as being 23 in *Denmark-court*. And I do not think that the Name, unaccompanied by the Number, tends to show that the House in question, was in *Denmark-court*.

Moreover, it was proved by Persons who had lived in the House, that the Letters and References which they received, were all addressed to them as the Occupiers of a House in the *Strand*; and, therefore, it is plain that there must have been impressed, on the House, the character of a House in the *Strand*; so that the Testatrix, when she spoke of her Houses in *Denmark-court*, did not, in point of Law, describe this House.

When a question is made, with respect to a House at the corner of a Street and of a Square, whether it belongs to the Square or to the Street, the question must be determined, (notwithstanding the door may be in the Street), by ascertaining whether the House corresponds with the Houses in the Street or in the Square. Mr. *Pepys* said that, if a Person had a House which stood at the corner of a Square and of a Street, and were to describe the House either as being in the Square or as in the Street, the House would pass; and there can be no doubt that it would. But that is not the question before me: because if this Testatrix had not had the Five Houses in *Denmark-court*, and had devised her Message in *Denmark-court*, there is sufficient of Evidence in this Case, to allow the House number 383 to pass. But, as it is quite plain

that Number 383 was not situate in *Denmark-court*, and as she had Houses which would satisfy the description which she has used, the House Number 383, cannot be held to have passed by the words: "My Freehold Messuages, Lands, Tenements and Hereditaments, situate and being in *Denmark-court*."

1833.
NEWTON
v.
LUCAS.

HASTINGS v. HANE.

FRANK ABNEY HASTINGS, by his Will dated the 23d of September 1825, after giving several specific and pecuniary Legacies, gave the Residue of his Property and Effects to *J. Macdowall*, and appointed him and *Sir Edmund Antrobus*, Executors of his Will.

1833:
16th March.

Will.
Construction.
Ecclesiastical
Court.

The Testator, soon after the Execution of his Will, sailed for *Greece*, entered into the service of the *Greek* Government, and was appointed to the Command of a *Greek* Steam Vessel of War, which was called, in English, "*The Perseverance*," and, in Greek, "*Karteria*." Whilst on board this Vessel he wrote, as follows, on the back of one of the Sheets of a Duplicate of his Will.

A Testator, after giving specific and pecuniary Legacies, willed that *A.* and *B.* should divide, equally, any Monies which might remain to his Account after payment of his Debts and pecuniary Legacies. The Testator, at the date of his Will and at his death, had Money-accounts subsist-

"On Board the *Perseverance* Steam Vessel, at Sea. —June 20th, 1826.—I hereby Revoke these my former Dispositions of my Property; and being, as I believe,

ing between him and his Bankers, and other Persons. Held that the Bequest did not pass his Residuary Estate, but only the Balances due on those Accounts, subject to the Debts and Legacies. This Court is not bound by the decision of the Ecclesiastical Court as to the effect of a Bequest.

27, v. Morgan
3. 7. & 6. 661.
from v. Jackson
2. 1. 1834

Haile v. Combes
5 Bely. 48. 677.

1833.
 HASTINGS
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unable to make any legal Transfer or Legacy of my Property from on board this Vessel, I can only request that Captain *Edward Scott*, R. N., the same mentioned in my former Testament, may inherit my Books, Instruments, Charts, Maps, Arms, and 1,000*l.* Sterling; and that *George Finlay*, now on Board this Vessel, may inherit 500*l.* Sterling; and that my Servant, *A. Ross*, may inherit all my Wearing Apparel, Stores, Wine, Plate, &c.; also that Mr. *Nicolo Kalergy*, *Greek*, now at *Tinos*, and Mr. *J. Hane*, Officer on Board this Vessel, may divide equally any *Monies which may remain to my account* after Payment of the aforesaid sums and my Debts.—*Frank Abney Hastings*, *Perseverance* Steam Vessel, at Sea. June 20th 1826.—The alteration in favour of *J. Hane* and *Nicolo Kalergy*, 8th August 1827. *Karteria Lyra*.”

On the 1st of June 1828, the Testator died in the Island of *Zante*, leaving the Plaintiffs, his Mother and Brother, his Next of Kin.

In November 1828, Mr. *Macdowall* proved the first Will, the original of which had been left, by the Testator, with Messrs. *Coutts & Co.* his Bankers. The Probate was afterwards revoked at the Suit of the Defendant *J. Hane*, and Letters of Administration to the Testator, with the second Will annexed, were granted to him.

The Bill insisted that the residue of the Testator's Estate was not disposed of by the second Testamentary Paper, and that the Plaintiffs were entitled to it as his Next of Kin.

The Bill prayed for the usual Accounts of the Testator's Estate, Debts, &c.; and that it might be declared that the Plaintiffs were entitled to the clear Residue of his Estate, and that it might be paid over to them according to their respective rights therein.

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The Answer stated that the Plaintiffs had contested the Defendant's Right to the Letters of Administration, in the Ecclesiastical Court, on the ground that the Testamentary Paper did not dispose of the Residue, but that it was undisposed of and belonged to them as his Next of Kin; that the Defendant, on the other hand, insisted that the Residue was disposed of by the Testamentary Paper, and that he, as one of the Residuary Legatees named therein, was entitled to the Letters of Administration; that Sir *J. Nicholl*, the Judge of the Court, decided that the Testamentary Paper, upon the true construction thereof, amounted to a Gift of the Residue to the Defendant, and, on that ground, decreed that the Letters of Administration should be granted to him. The Defendant submitted that that Decision was a Judgment by a Court of competent jurisdiction on the construction of the Will, and that the Judgment not having been appealed from, it was not competent to this Court to question that Decision, or to put, on the dispositions of the Will, a construction different from that which had been put on them by a Court to whose jurisdiction such questions properly belonged.

By the Decree, it was referred to the *Master* to inquire and state whether, on the 20th of June 1826, the 8th of August 1827 and the 1st of June 1828, or at any of those times, the Testator had any and what Money-

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account subsisting between him and any and what Person or Persons. The *Master* found that, on the 20th of June 1826, the 8th of August 1827, and the 1st of June 1828, the Testator had a Money-account subsisting between him and Messrs. *Coutts & Co.* as his Bankers in *England*, and that, on the 8th of August 1827 and the 1st of June 1828, he had also a Money-account subsisting between him and the *Greek* Government, in respect of his Disbursements on account of the Vessel, on which account 1,180 *l.* sterling were due to him on the 1st of June 1828; and that he had also, on the 1st of June 1828, owing to him from the *Greek* Bank or Commission of Finances, 474 *l.*, from *E. Henos*, 100 *l.* and from *D. Kalergy*, 118 *l.*; but the *Master* did not find that, besides such several Accounts aforesaid, the Testator had, at the respective times aforesaid, any other Money-account subsisting between him and any other Person or Persons. It appeared, however, by the State of Facts, that, on the 8th of August 1827 and 1st of June 1828, the Testator was entitled to 4,510 French Five per Cent. Rentes, and 600 *l.* Four per Cent. English Stock; and that the Balances due to the Testator from *Coutts & Co.* on the 20th of June 1826, the 8th of August 1827 and the 1st of June 1828, were, respectively, 92 *l.* 7 *s.* 6 *d.*, 81 *l.* 7 *s.* 6 *d.* and 300 *l.* 11 *s.* 11 *d.*

The Cause now came on for Further Directions.

Sir *E. Sugden*, Mr. *Knight* and Mr. *G. Richards*, for the Plaintiffs.

Mr. *Pepys* and Mr. *Jas. Russell*, for the Defendant, contended that the Bequest to *N. Kalergy* and the

Defendant *J. Hane*, was a Residuary Bequest. *Lynn v. Kerridge* (a), *Kendall v. Kendall* (b). They also relied on the Judgment pronounced by *Sir John Nicholl* as being conclusive.

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Sir E. Sugden, in reply, referred to *Hotham v. Sutton* (c.)

The VICE-CHANCELLOR:

I do not think that I am bound by the Judgment of *Sir John Nicholl*, as I do not know that he had before him the circumstances which are found in the Master's Report.

The question is whether the Testator meant to give the Monies that might remain to his account, or to give the general Residue of his Estate. I do not think that what Lord *Eldon* says in *Hotham v. Sutton*, bears on this Case; for he there speaks of the effect of the word "Monies," where it is found with other words. At the same time it appears to me that a Case might be put in which the word "Monies" would pass the general Residue (d). The question, however, is whether it passes the Residue in this Case.

Now I am bound, in putting a Construction on this Will, to give effect to every word in it. The Testator has not said that *Hane* and *Kalergy* may divide any Monies which may remain, but any Monies which may remain to his account. He had, at the date of his Will, some account; when he made the alteration, he had

- (a) *West's Cases*, temp. Hardwicke, 172. (c) 15 Ves. 319, see 327.
(b) 4 Russ. 360, see 369. (d) See *Ommanney v. Butcher*, 1 Turn. & Russ. 260.

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some account; and he had, at his death, some account which was adequate to pay the Legacies, and which, for aught I know, might be adequate to pay his Debts.

I am bound to give a meaning to the words, "to my Account:" and, therefore, I am of opinion that these Parties are not General Residuary Legatees, but are Legatees of the Balance that might remain to the Testator's account, after Payment of his Debts and Legacies.

Declare that *Kalergy* and *Hane* are entitled to the Surplus that may remain due on the Accounts specified in the Report, after payment of the Debts and Legacies.

1833:
 16 March.

PIGGOTT v. GREEN.

Executor.
Legacy.

THE question in this Case was whether an Executor, who had neither proved nor acted, was entitled to a Legacy given to him by the Testatrix in the Cause.

A Testatrix gave Legacies of 100*l.* each, to *A.*, *B.* and *C.*; and, in a subsequent part of her Will, she appointed them her Executors. In the preceding Clauses, she made Devises and Bequests "to her Executors thereafter named," and "to her Executors and Trustees." *A.* neither proved nor acted. Held that he was not entitled to the Legacy.

The following are the Clauses of the Will in which the Executors were mentioned.

"I give and devise all and every my Freehold Messuages, Lands, Tenements and Hereditaments whatsoever, and also all my Copyhold Messuages, Lands, Tenements and Hereditaments whatsoever, with their Appurtenances, unto and to the use of my Executors

Coburn v. Sisson 4. Beav. 222. Stacey v. Watney 2 Law Rep. 419
5. 13 Beav. 430.
Angermann v. Ford Miss v. Lawrence 8 Eq. 346
29 Beav. 352.

hereinafter mentioned, their Heirs and Assigns, in Trust, &c. &c.

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“ I give and bequeath unto my said Executors and Trustees, their Executors, Administrators, and Assigns, the Sum of 3,000*l.* of lawful English Money, upon Trust that they my said Trustees, shall and do, &c. &c.

“ I give and bequeath to *Edward Green*, of *Wargrave* aforesaid, Gentleman, *Wm. Fisher*, of *Friday-street, London*, Silk Mercer, and *Robert Lawrence*, of *Reading* in the County of *Berks*, Linen Draper, the Sum of 200*l.* Four per Cent. Bank Annuities, upon Trust that they the said *Edward Green*, *Wm. Fisher*, and *Robert Lawrence*, or the Survivor or Survivors of them, his Executors and Administrators, do and shall, from time to time, &c. &c.

“ I give and bequeath unto each of them the said *Edward Green*, *Wm. Fisher*, and *Robert Lawrence*, the Sum of 100*l.* I give and bequeath to *A. S. Morgan* the Sum of 100*l.* for her absolute use. Also I give and bequeath unto Mr. *R. Fisher*, of the *Strand*, the Sum of 100*l.* And also to Mrs. *Green*, the Wife of the said *Edward Green*, the Sum of 100*l.*

“ And, as to all the rest, residue and remainder of my Real and Personal Estate and Effects whatsoever and wheresoever, not hereinbefore disposed of, I give, devise and bequeath the same and every part thereof, unto the said *Edward Green*, *Wm. Fisher*, and *Robert Lawrence*, their Heirs, Executors, Administrators and Assigns, according to the nature and quality thereof respectively; but, nevertheless, upon Trust that they

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the said *Edward Green*, *Wm. Fisher*, and *Robert Lawrence*, or the Survivors or Survivor of them, his Heirs, Executors and Administrators, do and shall sell and dispose of and convert the same into Money, &c. &c.

“ And I hereby nominate, constitute and appoint the said *Edward Green*, *Wm. Fisher* and *Robert Lawrence* Executors of this my Will.”

The Defendants, *Green* and *Lawrence*, the acting Executors, paid *Fisher* his Legacy; but the *Master*, in taking the Accounts directed by the Decree, disallowed that Payment; upon which the Defendants excepted to the Report.

Sir *E. Sugden* and Mr. *Wakefield*, in support of the Exceptions, said that the Testatrix, when she gave the Legacies to the Executors, mentioned them by their names. *Cockerell v. Barber* (a).

The *Attorney-General* and Mr. *Temple*, in support of the Report, said that the Testatrix had united the three Persons, whom she afterwards appointed her Executors, in one Bequest. *Stackpoole v. Howell* (b).

The VICE-CHANCELLOR:

I think that the *Master* is right.

The rule is that, where a Legacy is given to an Executor, *prima facie*, it is given to him for his trouble; and, if he refuses the office, he is not entitled to it; but if it can be collected, from the whole of the Will, that

(a) *Ante*, Vol. I. p. 23.

(b) 13. Ves. 417.

the Legacy was not given to him in respect of the Office, then he will be entitled to it. *Page 6 - B.*
1. Coll. 367

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The Case of *Cocherell v. Barber* affords sufficient special circumstances to show that the general rule did not apply. There I should have thought, from the Testator's using the expression "My Friend and Partner," that it ought to be taken that the Legacy was given to him as a Friend and Partner; and there was no Gift, of the same amount, to all the Executors.

The Testatrix, in this Case, frequently calls these Legatees "her Executors," and "her Executors and Trustees;" and she then classes them together, and gives a Legacy, *of the same amount*, to each of them. And, on these grounds, I am of opinion that the Executor who did not act, is not entitled to his Legacy; and, consequently, the Exception must be over-ruled.

FREEMAN v. SIMPSON.

1833:

17th March.

Legacy.

Interest.

THE Testator in this Cause gave a Legacy of 300*l.* to his Daughter; and he devised a Messuage, then in his own occupation, and all other his Real and Personal Estate, to his Wife, for her life; and, after her decease, he gave the Messuage, subject to the payment of and chargeable with the Legacy, to his Son in fee.

Testator gave a Legacy to his Daughter, and all his Real and Personal Estate to his Wife,

and, after her death, he gave his Real Estate, subject to the Legacy, to his Son in fee. The Wife survived the Testator, and afterwards died. Held that the Legacy, with Interest from the end of a Year after the Testator's death, was raiseable out of the Real Estate, in case the Personal Estate was deficient.

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The Testator died leaving his Wife surviving. She afterwards died; and, after her death, the Bill was filed by Persons to whom the Legacy had been assigned, alleging that the Testator's Personal Estate was insufficient to pay his Debts, and praying that the Legacy, with Interest from the end of one year after the Testator's death, might be raised by sale of the Messuage.

The question was whether Interest was payable, on the Legacy, from the end of a year after the Testator's death, or from the death of his Widow.

Sir *E. Sugden* and Mr. *Wilbraham*, for the Plaintiff, said that the Legacy was, primarily, a charge on the general Personal Estate, and, therefore, must carry Interest from the end of a year after the Testator's death. *Davies v. Davies (a)*.

Mr. *Knight* and Mr. *Shortland*, for the Devisee of the Messuage and Mortgagees under him, said that the Plaintiff could not have claimed the Interest as against the Widow; for the Testator's intention was that she should have all the Real and Personal Estate for her life, and, consequently, that the Legacy could not be payable till her death.

Mr. *Simons*, for the Testator's Personal Representative.

The *Vice-Chancellor* said that the Testator's Personal Estate was, in the first instance, answerable for the Legacy; and, therefore, that it bore Interest from the end of one year after the Testator's death; and, if the

(a) Daniell's Rep. 84.

Personal Estate, was not sufficient to pay the Testator's Debts, the Plaintiffs were entitled to have the Legacy and Interest raised by Sale of the Messuage.

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WILLIAMS v. JANAWAY.

THE Plaintiff filed a Replication before Trinity Term 1832, and, in that Term, he served a Subpœna to rejoin. No step was afterwards taken by the Plaintiff. On the first Seal after Hilary Term 1833, the Defendant moved to dismiss the Bill for want of prosecution. No Notice of Motion to Dismiss had been served before the Replication was filed.

1833 :
28th March.

*Practice.
New Orders.
Dismissal of
Bill.*

The 17th Order of 1831, does not apply except in cases where the Plaintiff requires a Commission: in other cases, the old Practice remains unaltered.

Mr. Bethell, for the Motion, referred to the 17th Order of 1831, and said that the old practice in such a case, was that the Defendant should set down the Cause at his own request: that that process was very tedious; for one clear Term must elapse after the Term in which the Cause was put at issue, and, in the following Term, the Defendant might give a Rule to produce Witnesses. Then another clear Term must elapse, and, in the following Term, a Rule to pass Publication might be given, and, in the Term following, the Cause might be set down.

*Smith v. Plaine
12 & 13. 185
Roe v. Perry
1818.
White v. Smith
1. Harn. 381.*

The Vice-Chancellor held that the 17th Order of 1831, did not apply except in a Case where the Plaintiff wanted a Commission, and had obtained or required an order for a Commission to examine Witnesses, inasmuch as the obligation to give the Rules to produce Witnesses and to pass Publication, and to set down the Cause, was governed by the antecedent words "and

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requires a Commission:" and, consequently, in Cases like the present, the old practice remained unaltered (a).

(a) See Anon. ante Vol. V. p. 497.

PEDDIE v. PEDDIE.

1833:

1st April

Construction.
Scotch
Settlement.

By a Scotch Settlement, a sum of Stock, was settled on the Husband and Wife for their Lives, and, after the death of the Survivor, on their Children, and, failing Children, on the nearest Heirs of the Wife: and she was empowered, at any time in her life, and even on death-bed, to bequeath or dispose of the Stock to any Person and in any Manner she might think proper. Held that the Power was not intended to be available, except in the event of there being a failure of Children of the Marriage.

PREVIOUSLY to the Marriage of the Defendant *J. C. Peddie* with *Eliza Baillie*, both of whom were resident and domiciled in *Scotland*, the following Agreement or Article of Settlement, dated the 9th of Nov. 1825, was entered into between them: "It is contracted, agreed, and matrimonially ended between the Parties following, viz. *John Crofton Peddie*, Lieutenant in his Majesty's 21st Regiment of Foot, on the one part, and Miss *Eliza Baillie*, Daughter of the late *James Baillie*, Esq. on the other part, in manner following, that is to say, the said *John Crofton Peddie* and *Eliza Baillie* have accepted, and do hereby accept of each other for lawful Spouses, and hereby bind and oblige themselves to solemnize their Marriage with all convenient speed, agreeably to the rules of the Church. In contemplation of which Marriage, and in consideration of the Settlement after-mentioned, the said *John Crofton Peddie* hereby disposes, assigns, conveys and makes over, to and in favour of himself and the said *Eliza Baillie*, in conjunct Fee and Life Rent, for her Life Rent use, allenary, and to the Child or Children to be born of the intended Marriage, equally among

Brookhurst v. Hunt 16 Bear. 101.

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them, share and share alike, in Fee, all and sundry his whole Lands, Heritages, Debts and Sums of Money, heritable and moveable, lying Money, Goods, Gear, and all other heritable and moveable means and Estate of whatever nature or denomination the same may be resting and pertaining, or shall be resting and pertaining to him at the time of the dissolution of the Marriage, together with all Charters, Dispositions, Adjudications, and heritable and moveable Bonds, Tacks, Contracts, Assignations, Translations, Bills, Promissory Notes, and all other Writs and Securities whatsoever heritable and moveable, made and granted, or that shall be made and granted, or which can anyways be interpreted in his favour at the time of the dissolution of the Marriage, with all action, diligence and execution competent, or that may be competent on the Premises, and all that has followed or may follow thereupon. For which causes, and on the other part, the said Miss *Eliza Baillie* hereby disposes, transfers, assigns, conveys and makes over, to and in favour of herself and the said *John Crofton Peddie*, her promised Spouse, in case he shall survive her, in Life Rent, for his Life Rent use, alienary, and to the Child or Children to be born of the intended Marriage, equally among them, share and share alike, in Fee; whom all failing, to the said *Eliza Baillie's* own nearest Heirs; declaring always, as it is hereby expressly provided and declared, that the said *Eliza Baillie* shall have full power and liberty, and such full power and liberty is hereby expressly reserved to her, at any time in her life, and even on death-bed, by a Writing under her hand, or by a Will or Settlement, to leave and bequeath, or dispose of the Sum of £,000 l. Three pounds per Cent. Consols hereinafter conveyed in Trust, and the whole of her means, Estate

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and Effects, to any person or persons, and in any way and manner she may think proper, all and whole the Sum of 6,000*l.* Three per Cent. Consolidated Annuities, at present standing in the said *Eliza Baillie's* name, but to be transferred into the names of *James Baillie*, Esq. *Charles Johnston*, Captain in the Royal Navy, *Wm. Peddie*, Esq. and *Alex. Hutchinson*, Writer in *Edinburgh*, and the Survivors or Survivor of them, in Trust, always, for the said *Eliza Baillie* and *John Crofton Peddie*, and the Child or Children to be born of the intended Marriage, and the other uses and purposes, before and after expressed, with the whole Dividends to become due thereon after the decease of the said Miss *Eliza Baillie* and *John Crofton Peddie*, or the longest liver of them; declaring always that it shall be in the power of the said *James Baillie*, *Charles Johnston*, *William Peddie* and *Alexander Hutchinson*, as Trustees aforesaid, or the Survivor or Survivors of them, on being required so to do in writing by the said *Eliza Baillie* and *John Crofton Peddie*, to sell out of the said 6,000*l.* Three per Cent. Consols, any Sum or Sums not exceeding 2,000*l.* sterling, and to apply the same in the purchase of a Commission or Commissions in the Army for the Advancement of the said *John Crofton Peddie* in his Profession; but, in the event of the said *John Crofton Peddie* afterwards selling out of the Army the Commission or Commissions so to be acquired by him, he hereby binds and obliges himself to re-invest the said 2,000*l.*, out of the Sums so to be received by him in the Sale of such Commission or Commissions so purchased, in the names of the said Trustees before mentioned, or the Survivors or Survivor of them, for the Purposes aforesaid under the Declarations before written. And the said *John Crofton Peddie* and *Eliza*

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Baillie bind and oblige themselves, respectively, and the Survivor of them, to aliment, entertain and educate the Child or Children to be born of the intended Marriage, suitably to their Station: and the said *John Crofton Peddie* hereby nominates and appoints the said *Eliza Baillie, James Baillie, Charles Johnston, William Peddie* and *Alexander Hutchinson*, and the Survivors and Survivor of them, to be Tutors and Curators to the Child or Children to be born of the intended Marriage, during their Minority, with all the Powers conferred on Tutors and Curators by the Law of *Scotland*, declaring that the said Trustees and Tutors and Curators shall not be liable for omissions, but only each of them for their actual Intromissions: and, farther, it is hereby covenanted and agreed on by both Parties that, although the said Marriage should happen to be dissolved by the death of either Party within the space of one year and a day after the Solemnization thereof, and without a living Child procreated of the same, yet this present Contract and the whole Provisions herein contained in favour of the Husband and Wife respectively, shall subsist and continue in full force in favour of the Survivor, in the same manner as if the Marriage had subsisted for more than a year and day, or a living Child had been procreated of the same, any Law or Custom to the contrary notwithstanding. And it is also hereby agreed that all Action and Execution for implement of the Obligations incumbent on the said *John Crofton Peddie*, shall pass at the instance of the said *James Baillie, Charles Johnston, William Peddie*, and *Alexander Hutchinson* as Trustees aforesaid, or all of them or either of them."

The Marriage was solemnized, in *Scotland*, on the
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10th of November 1825 ; but the Trustees never executed the Articles of Settlement, nor were the 6,000 *l.* Consols ever transferred into their names.

After the Marriage, the whole of the Stock, except 2,285 *l.* 7 *s.* 9 *d.*, was sold out, at different times, under Powers of Attorney jointly executed by the Husband and Wife ; and part of the Proceeds was applied in the Purchase of a Captain's Commission for the Husband.

The Bill was filed by the three Infant Children of the Marriage, praying that new Trustees of the Articles might be appointed, that the Stock remaining unsold might be transferred into their names, that the Stock which had been sold out in breach of the Articles, might be replaced by *J. C. Peddie*, and that, in the mean time, the Dividends might be applied, during his life, in making good so much of the Stock as had been sold out.

After the commencement of the Suit, a Deed-poll, dated the 8th of October 1832, was executed by *Mrs. Peddie*, by which, after reciting the Articles, and the Sales which had been made of the Stock, she, in exercise of the Power reserved to her by the Settlement, appointed both the parts which had been sold out and which remained unsold, to Captain *Peddie*, absolutely. Captain *Peddie*, by his answer, claimed to be entitled to the whole of the Stock, under the Deed-poll, and to have the same benefit thereof as if he had pleaded the same to the Bill.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Sharpe*, for the Plaintiffs, said that the power to dispose of the 6,000 *l.* Stock, was intended to take effect, only in the event of

there being a failure of Children of the Marriage, and that it came in the place of the limitation to the nearest Heirs of *Mrs. Peddie* ; and, as there were Children of the Marriage, the Appointment was inoperative.

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The *Attorney-general* and Mr. *O. Anderdon*, for the Defendants, said that it was plain, from the language of the Articles, that *Mrs. Peddie* was empowered to dispose of the Stock, at any time, or in any manner, and that that Power overrode all the antecedent limitations in the Articles.

The VICE-CHANCELLOR :

I do not understand it to be contended that, by the Law of *Scotland*, there is any settled meaning of the words by which the Power in question is given ; and, therefore, I shall construe these Articles in the same manner as I should construe an *English* Settlement, that is, so as to make the whole consistent.

Now the last Power in the Articles, is utterly inconsistent with the notion that the Wife had a general Power to dispose of the whole Fund : and my opinion is that the Power to appoint the 6,000*l.* Stock, cannot be exercised, except in the event of there being a failure of Children of the Marriage.

Declare that the Plaintiffs are entitled to have the sum of 6,000*l.* Stock invested and secured, in the names of Trustees, upon the Trusts of the Articles, subject to the Proviso therein contained : that the Power to appoint the 6,000*l.* Stock, will only become available in the event of failure of Children of the Marriage ; that the Appointment made by the Deed-poll of the 8th October

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1832, is inoperative: and that the Defendant *J. C. Peddie* is entitled to have the benefit of the Proviso in the Articles mentioned, respecting the purchase of a Commission or Commissions in the Army for his advancement in his Profession. Order the Defendants *Peddie* and Wife, to transfer into the name of the Accountant-general, in Trust in this Cause, to an account to be intituled "On the Trusts of the Marriage Articles of the 9th day of November 1825," the sum of 2,285 *l.* 7 *s.* 9 *d.* Bank Three per Cent. Annuities, now standing in the name of the Defendant *Eliza Peddie*, such Sum to be taken as part of the 6,000 *l.* like Annuities. Order that the Defendant *J. C. Peddie* do receive the Sum of 68 *l.* 11 *s.* 2 *d.*, the amount of the Dividends which are now due in respect of the 2,285 *l.* 7 *s.* 9 *d.* Stock, and pay the same into the Bank with the privity of the Accountant-general, to be there placed to the credit of the Cause, to an Account to be intituled "The Dividend Account." Order that the same, when so paid in, and all accumulations of Dividends be laid out in the purchase of Bank Three per Cent. Annuities, in the name and with the privity of the Accountant-general, in Trust in this Cause, the like Account. Order the Plaintiff's Costs to be taxed, and the amount raised out of the 2,285 *l.* 7 *s.* 9 *d.* Stock. Order that the Dividends to accrue due thereon until such Sale, and on the residue after such Sale, and all accumulations of Dividends, be, from time to time, laid out in the purchase of Bank Three per Cent. Annuities, in the name and with the privity of the said Accountant-general, in Trust in this Cause, to the Account intituled "The Dividend Account." Declare that the Defendant, *J. C. Peddie*, is bound to make good so much of the difference of the 6,000 *l.* and 2,285 *l.* 7 *s.* 9 *d.* Stock,

as shall not have been properly applied in the purchase of a Commission or Commissions pursuant to the Articles. Refer it to the *Master* to inquire and state what sum or sums of money have been properly applied in the purchase of such Commission or Commissions, and how much of the Stock sold out was necessary to raise what the *Master* shall find to have been so applied. Order the *Master* to give credit, to the Defendant *J. C. Peddie*, for so much Bank Annuities as he shall find was necessary to be sold for that purpose, and to ascertain and state the amount of the deficiency, and that the Defendant *J. C. Peddie* do transfer, into the name and with the privity of the Accountant-general in Trust in this Cause, to the Account "On the Trusts of the Marriage Articles," so much Bank Three per Cent. Annuities as the *Master* shall certify to be the amount of the deficiency. And, it being alleged, by the Answer of the Defendants *Peddie* and Wife, that the Defendants *James Baillie*, *Charles Johnston*, *William Peddie* and *Alexander Hutchinson*, decline to accept the Trusts of the Articles, and that they are resident out of the Jurisdiction of the Court, declare that proper Persons ought to be appointed Trustees of the Articles in their room.

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1833:
1st April.

*Vendor and
Purchaser.*

Title.

*Power of Sale
and Exchange.*

—
The Donees of
a Power of Sale
and Exchange,
may pay Money
for Owelty of
Exchange, al-
though they are
not expressly
authorized so to
do.

BARTRAM v. WHICHCOTE.

JOHN MANNERS, Esquire, by his Will dated the 13th of September 1791, devised to Trustees and their Heirs, all his Lands and Hereditaments at *Osbournly*, and also all other Lands and Hereditaments of which he had power to dispose by his Will, in Trust to convey, settle and assure the same, from and after his decease, to the use of his eldest Son, *William Manners*, and his Assigns for life, with remainder to Trustees to preserve contingent Remainders, with remainder to the use of the first and other Sons of *William Manners*, successively, in Tail Male, and, for want of such Issue, to the uses thereafter mentioned: and he directed that the Settlement to be made in pursuance of his Will, should contain a Proviso and Declaration that it should be lawful for the Trustees thereof for the time being, at any time or times thereafter, at the request and by the direction of the Person or Persons who, by virtue of the limitations contained in such Settlement, should, for the time being, be entitled to the Rents and Profits of the said Hereditaments, and testified as therein mentioned, to dispose of and convey, either by way of absolute Sale, or in exchange for or in lieu of other Hereditaments to be situate in *England*, all or any part of the Estates so directed to be settled, and the Inheritance thereof in Fee Simple, to any Person or Persons whomsoever, for such price or prices in Money, or for such equivalent or recompense in Manors, Lands or Hereditaments, as to the Trustees should seem reasonable; and that, for the purpose of effectuating such Dispositions or Conveyances, but not for any other purpose, it should be lawful for the

Trustees, with such consent and approbation as therein mentioned, by any Deed or Deeds, to be executed and attested as therein mentioned, to revoke, determine and make void all and every, or any of the Uses, Trusts, Powers and Provisoos in and by such Settlement to be limited, declared and expressed of or concerning the Estates therein to be comprised or any part thereof, and, by the same or any other Deeds or Deed, Instruments or Instrument in writing, to limit, declare, direct, or appoint any Use or Uses, Estate or Estates, Trust or Trusts of the same Estates, or any part or parts thereof, which it should be thought necessary or expedient to limit, declare, direct or appoint in order to effectuate such Sales, Dispositions and Conveyances ; and also a Clause, Agreement or declaration that the Trustees should settle and assure, or cause to be settled and assured, as well the Hereditaments so to be purchased, as the Hereditaments to be received in exchange, to, upon and for the same uses, trusts and purposes, and with, under and subject to the same Powers, Provisoos, Conditions and Agreements as were thereby directed to be limited, expressed, declared and contained of and concerning such of the Hereditaments to be comprised in such Settlement, which should be so sold or given in exchange.

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The Testator died in 1792.

By Indentures of Lease and Release of the 8th and 9th of April 1793, *William Manners*, who had then become Sir *William Manners*, Bart., ratified and confirmed his Father's Will, in order to avoid the expense of proving it in Chancery ; and he and the Trustees made a settlement of the devised Estates, conformable, in every respect, to the directions of the Will.

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One of the Trustees having died, *Charles Butler, Esq.* was appointed a Trustee in his place.

In April 1824, the Trustees, at Sir *W. Manners's* request, agreed with *Robert Bartram*, that the *Osbournly* Estate should be appointed and released to him in exchange for certain Lands at *Buckminster* and *Sawston*, in *Leicestershire*, of which he was seised in Fee, and for 500 *l.* to be paid to him, by the Trustees, out of the Monies in their hands under the Trusts of the Will, for equality of exchange. And, accordingly, by Lease and Release, of the 21st and 22d of January 1828, *Bartram* conveyed his Lands at *Buckminster* and *Sawston*, to such uses, upon such Trusts, for such intents and purposes, and with, under and subject to such Powers, Provisoos, Conditions and Agreements to, upon, for, or with, under and subject to which the same ought, as Hereditaments received in exchange under an exercise of the Power of Exchange contained in the Will of *John Manners* and the Indenture of the 9th of April 1793, to stand and be limited and settled, in exchange for the said Premises agreed to be exchanged for the same: and the Release contained a Proviso, that if *Bartram*, his Heirs, or *Assigns*, should, without his or their default, *be evicted* from or disturbed in the possession of the Premises intended to be appointed and conveyed in exchange, *it should be lawful for him and them to enter into the Hereditaments and Premises thereby conveyed in exchange*, and that the same Hereditaments and Premises should, thenceforth, be to the same uses as if the now stating Indentures had not been made.

Bartram, by his Will dated the 14th of January 1828, after reciting the Agreement with the Trustees,

devised all his Lands, Tenements and Hereditaments situate at *Buckminster* and *Sawston*, and also the Farm, Lands and Hereditaments situate at *Osbournly*, agreed to be taken by him in exchange from the Trustees, to the Plaintiffs in Fee, in Trust to perform the Agreement, and, for that purpose, he directed that the Plaintiffs should convey and assure the Hereditaments and Estates situate at *Sawston* and *Buckminster*, to the Trustees of the Settlement, in exchange for the Hereditaments and Estate situate at *Osbournly*, and that the last-mentioned Hereditaments and Estate situate at *Osbournly*, should be conveyed to the Plaintiffs their Heirs and Assigns, and that the same should be subject to the same Trusts as he should therein declare as to his Hereditaments and Real and Personal Estates; and, he directed that his Trustees should, as and when they should think proper and convenient after his decease, absolutely sell and dispose of his said Hereditaments and Real Estates, and collect, get in and convert into Money his Personal Estate, and dispose of the Money to arise therefrom in manner therein mentioned.

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Bartram died on the 29th of March 1828.

By Lease and Release and Appointment of the 1st and 2d of September 1828, after reciting that the Plaintiffs had, in exercise of the Trusts reposed in them by *Bartram's* Will, and for carrying into effect the exchange, required the Trustees of the Settlement to convey the *Osbournly* Estate, and to pay 500*l.*, agreed to be paid by way of equality of exchange, to them, and that, in pursuance of the Agreement for the exchange, *Charles Butler* had paid to the Plaintiff *C. Bartram*, out of the Trust-mones in his hands, the sum of 500*l.*,

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by way of equality of exchange; the Estate at *Osbourne* was appointed and conveyed by the Trustees of the Settlement, and by Sir *W. Manners*, to the Plaintiffs in Fee, upon and for the Trusts and purposes declared by *Bartram's* Will.

On the 29th of November 1830, the Plaintiffs, in performance of their Trusts, agreed, with the Defendant, to sell to him part of their Testator's Estates, including the Estate at *Osbourne*, for 12,500*l*.

The Defendant having refused to perform his Agreement, the Bill was filed to compel a Specific Performance.

The Defendant, in his Answer, said that he had no objection to the Plaintiffs' title, except that the exchange made by *R. Bartram* with the Trustees of the Settlement, and so carried into effect as before mentioned, was not good and valid, and, therefore, the Plaintiffs had no Title to the *Osbourne* Estate: that the grounds upon which he insisted that the exchange was not valid, and had not been legally and effectually carried into effect, were that the power of exchange did not authorize the gift of any Money for equality of exchange, and that the Exchange was made with *Robert Bartram*, and that he performed his part of it, while the exchange, or the conveyance to perfect it, was made to the Trustees of his Will: that an Exchange, to be valid, ought to be completed by and between the same Persons or Parties, and not by one Party and the Representatives of the other Party: that he was satisfied with the Title, except in respect of the question so raised by him as to the validity of the exchange. And he submitted that

the Exchange was, under the circumstances before mentioned, not authorized, and that it had not been legally and effectually carried into effect; and that the Plaintiffs had not a good Title to the *Osbourne* Estate.

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Sir *E. Sugden* and Mr. *Barber*, for the Plaintiffs :

The Purchaser objects to complete his purchase, on the ground that the Trustees of the Settlement of April 1793, (though they had a Power of Sale and Exchange) had no power to give money for owelty of exchange.

Two Estates exactly of equal values, can never be met with, and, therefore, it is incident to the Power, to receive Money for owelty of exchange. By the Common Law, Money may be received for owelty of partition. The Trustees who paid the 500 *l.*, had a Power of Sale: that Sum, therefore, must have arisen from the Sale of part of the settled Estates. *Doe v. Preston (a)*.

Mr. *Preston* and Mr. *Lynch*, for the Defendant :

This is quite a novel Case, both in point of practice and of decision. The transaction was partly a purchase, and partly an exchange. Powers must be strictly pursued; and the Parties in whom a Power is vested, can do only what the Power authorizes. Here the Trustees of the Settlement, were not authorized to pay any Money for owelty of exchange.

Under an exchange, each Party must have a right of re-entry on eviction: but, in this Case, if eviction takes place, the whole 500 *l.* will be lost.

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Bartram died before the transaction was completed ; and, if an exchange is not perfected in the lifetime of both Parties, it is void (b).

The VICE-CHANCELLOR :

There is no objection to this transaction in principle.

The exchange in this Case, was not an exchange at Common Law, nor is it subject to the same rules.

The remedies which the Parties have in case of eviction, are not the same as the Common Law gives, but are provided by the Covenants in their Conveyances. If either of the Parties to an exchange at Common Law, aliens the Land taken by him in exchange, his right of re-entry is destroyed (c).

No analogy, therefore, exists between a transaction like the present, and an exchange at Common Law ; and the fact that Mr. *Bartram* died before the Conveyance to him was executed, does not affect the Case.

As the 500*l.* has been paid, and the Lands have been conveyed to his Trustees, I am of opinion that they have a good Title, and, consequently, the Purchaser is bound to complete his purchase.

(b) Co. Lit. 50 b. (c) *Bustard's Case*, 4 Co. Rep. 121.

GARDNER v. HATTON.

1833 :
2d April.

*Specific Legacy.
Ademption.*

PHILIP GARDNER, by his Will dated the 9th of September 1822, devised certain Real Estates to his Son, *Philip Thomas Gardner*, (the Plaintiff) for his life, and then expressed himself as follows: "Also I give and devise the Interest of the sum of 26,183*l.* 10*s.* 2*d.* Stock, standing in my name in the Three per Cent. Consols, also I give and devise the Interest of 7,000*l.* secured on Mortgage of an Estate at *Worstead*, in the county of *Norfolk*, belonging to Mr. *Robert Tuck*, also I give and devise the Interest of 6,000*l.* now secured on Mortgage of an Estate at *Conway* in the County of *Carnarvon*, belonging to the late *Holland Williams*, Esquire, also I give and devise the Interest of 6,000*l.* now secured on Mortgage of an Estate at *Carreglhoyd* in the Isle of *Anglesey*, belonging to *Holland Griffith*, Esquire, during the term of his natural life, then, with the Interest of 1,100*l.* now secured on Mortgage of an Estate at *Berthhoyd* in the County of *Merioneth*, belonging to Miss *Ellen Evans*, together with those devised above to my Son *Philip Thomas Gardner* during the term of his life, to the use of *Charles Madryll*, Esquire, and the Rev. *Charles William Burrell*, in Trust, after his death, to go with the Estates to the first-born Son of the body of my Son lawfully begotten, and to the Heirs Male of the body of such Son lawfully begotten, and, in default of such Issue Male of such Son, to the first, second, or third, and all and every the other

Testator bequeathed 7000*l.* secured on Mortgage of an Estate at *W.* belonging to *R. T.* The 7,000*l.* and interest were received after the date of the Will, by the Testator's Agent, on his account, and, immediately afterwards, 6,000*l.* part of it, was invested on another Mortgage, and the remainder was paid into a Bank in which the Testator had no other Monies, but was afterwards drawn out by a Person to whom the Testator had given a Cheque for the Amount. Held that the Legacy was

specific, and, notwithstanding the 6,000*l.* remained due on the second Mortgage at the Testator's death, that the Legacy was wholly adeemed.

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Son or Sons of the body of my said Son lawfully begotten." And, after making several other Bequests, the Testator gave to the Plaintiff, his Watch and Golden Chain, together with all the Remainder and Residue to be considered as undisposed of and go to him.

The Testator died on the 10th of September 1826.

The Bill prayed that it might be declared that the the Bequest of the 7,000*l.* secured on Mortgage, &c. was specific, and was adeemed by the Testator calling in and receiving the same after the date and publication of his Will.

The Decree referred it to the *Master* to inquire and state whether the sum of 7,000 *l.* secured on Mortgage as in the Pleadings mentioned, was paid off in the Testator's lifetime, and how and to whom and in what manner the same was disposed of, with liberty to state special circumstances.

The *Master's* Report set forth an Affidavit made by *C. Pemberton*, of *Cambridge*, Gentleman, who deposed that the Testator's Personal Estate, at the time of making his Will, consisted, in part, of a Mortgage-debt of 7,000*l.* secured as mentioned in the Will: that, on or about the 17th of October 1825, the whole of the Principal, together with an arrear of Interest amounting to 340 *l.* 14*s.* 7*d.*, was paid off by *Tuck*, and received by the Testator's Solicitor on his behalf, after the Testator had executed the Re-conveyance of the Mortgage; and that, immediately afterwards, 6,000*l.*, part of the Money paid off, was invested, by the Testator's Solicitor, on another Mortgage, dated the 18th and 19th

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of October 1825, of a Freehold and Copyhold Estate at *Hardwicke*, in *Cambridgeshire*, belonging to *William Royston*, on which Security the 6,000 *l.* had ever since continued: that, on or about the 17th of October 1825, the Testator opened an Account with Messrs. *Mortlock & Sons*, Bankers at *Cambridge*, on which day the residue of the first mentioned Mortgage-debt, amounting to 1,340 *l.* 14*s.* 7*d.*, was paid by the Testator's Solicitor into the hands of Messrs. *Mortlocks*, and was by them placed to the Testator's credit: that, on or about the 7th of December 1825, the Testator drew out the sum of 1,340 *l.* 14*s.* 7*d.*, by a Check payable to one *C. Hare*, who was the managing articled Clerk and Son-in-law of the Testator's Attorney, and that the same Sum was placed to *Hare's* Credit with the said Bankers, on or about the same 7th of December 1825: that no other sums were entered, either to the debit or to the credit of the Testator with the said Bankers, on or between the 17th of October and the 7th of December 1825; that no security was taken, by the Testator from *Hare*, for the 1,340 *l.* 14*s.* 7*d.*, nor was any consideration paid or given for the same: that, in or about Trinity Term 1829, the Testator's Executrix commenced an action against *Hare*, for recovery of the 1,340 *l.* 14*s.* 7*d.*, which she was informed *Hare* had never accounted for, but the action abated by his death, and his Widow proved his Will and carried with her the whole of his Property to *America*: that no direction, to the Depo-
nent's knowledge, was given by the Testator that the 6,000 *l.* so laid out as aforesaid, was to be in substitution of the Mortgage paid off by *Tuck*, and which had been bequeathed by the Will. The *Master* certified that, upon consideration of the matters aforesaid, he found that the 7,000 *l.* secured to the Testator, &c., was

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paid off in his lifetime, and that the Principal and Interest were received by his Solicitor on his account; and that, subsequently thereto, 6,000*l.*, part thereof, was invested by the Testator's Solicitor as before mentioned, and was still due and owing, and that the Residue, amounting to 1,340*l.* 14*s.* 7*d.*, was received and retained by *Hare*, and was still due from his Estate.

Sir E. Sugden and *Mr. Bethell* for the Plaintiff, said that the Bequest of the 7,000*l.*, as well as the Bequests that preceded and followed it, was clearly specific; and that the only question was whether the specific Money had been re-invested: that the Testator had not laid the Money by, for the Legatee, but dealt with it as a general Fund: that he had laid out part, and dealt with the rest as part of his general Assets. *Fryer v. Morris* (a); *Barker v. Rayner* (b).

Mr. Treslove and *Mr. Ching*, for the Defendant:

This is a demonstrative Legacy. The Testator gives the Interest of the 7,000*l.*, not as a specific Legacy, but as a Sum then out on Mortgage. He meant to give the Interest of the 7,000*l.*, wherever it might be found at his death. The Money was not received by the Testator, but by his Solicitor, on his behalf.

Supposing the Bequest to be specific, it appears, from the manner in which the Testator disposed of the Money, that he intended to preserve it for the Legatee. The 6,000*l.* was laid out immediately after the first Mortgage was paid off: the dates of the Deeds show that it was all one transaction. The second Security

(a) 9 Ves. 360.

(b) 5 Madd. 208.

was provided before the Money was received ; and the 1,340 *l.* 14 *s.* 7 *d.* was paid to a Banker in whose hands the Testator had no other money. *Coleman v. Coleman* (c) ; *Chaworth v. Beech* (d) ; *Le Grice v. Finch* (e) ; *Barker v. Rayner* (f) ; *Ashburner v. Macguire* (g) ; *Gillman v. Adderley* (h) ; *Hambling v. Lister* (i). Swinb. 626, Godolphin, 324.

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The VICE-CHANCELLOR :

This is a plain Case.

In *Ashburner v. Macguire*, Lord *Thurlow* held that the Legacy was clearly specific, and that it was adeemed to the extent of the Dividend which had been received by the Testator under the Commission ; and all that he decreed was that the Bond should be delivered up to the Wife and Children, in order that they might receive the Dividend not received by the Testator, and whatsoever might thereafter be payable, out of the Bankrupt's Estate, in respect of the Debt. But he did not direct that the Legatees should be recouped out of the general Assets of the Testator.

In *Le Grice v. Finch*, the *Master of the Rolls* puts it thus, that the Sum given was so described in the Will, that it was a matter of indifference whether it remained out on Mortgage at the time of the Testatrix's death, or not, and, therefore, the circumstance of calling it in did not affect the Gift.

(c) 2 Ves. 639.

(d) 4 Ves. 555.

(e) 3 Mer. 50.

(f) 2 Russ. 122, on appeal.

(g) 2 Bro. C. C. 108, *see*

111.

(h) 15 Ves. 384.

(i) Amb. 401.

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In *Barker v. Rayner*, no Person could doubt that the Policies were specifically given.

The Cases cited for the Defendant, do not, as it seems to me, affect the present question: and I cannot entertain a doubt, seeing how the Testator has placed this Bequest, that it is as much a specific Gift, as the Gift of the Dividends of the Sum of Stock.

I must take it that every thing was done with the knowledge of the Testator. He executed the Re-conveyance to the Mortgagor; and the 6,000 *l.* was laid out on a new Security, given by a new Person; so that a new Debt was constituted; and then he gave a Cheque for the 1,340 *l.* 14*s.* 7*d.* to *Hare*.

My Opinion is that, when the Testator received the whole of the Debt, there was an end of the subject, and, consequently, that this is a clear Case of Ademption.

WEIGALL v. BROME.

CHARLES BROME made his Will, dated the 18th of December 1828, as follows: "I give and devise, unto Sir *Charles Saxton*, Bart. all my Real Estate whatsoever and wheresoever, to hold the same unto and to the use of the said Sir *Charles Saxton* and his Heirs, until my Son, *Charles John Bythesea Brome* shall attain the age of 21 years, or shall depart this life under that age, upon Trust to receive the Rents and Profits thereof, and, thereout, to pay and apply the yearly Sum of 400*l.*, or so much thereof as he shall, in his discretion, think proper, for the Maintenance and Education of my said Son *Charles John Bythesea Brome* until he shall attain the age of 21 years, and to lay out the Surplus of such 400*l.* a year, if any, in the purchase of Bank Annuities, in his own Name, to

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16th and 18th
April.

Will.
Construction.
Leaseholds for
Lives.

A Testator, seized of Freeholds and Copyholds in Fee, and Leaseholds for Lives, devised "all his Real Estate whatsoever and wheresoever." Held that the Copyholds and Leaseholds for

Lives, as well as the Freeholds in Fee, passed, notwithstanding some parts of the Will were inapplicable to them.

Testator gave to his Son, in case he should live to attain 21, such part of his Real Estate as his Son should choose, but not exceeding the yearly value of 350*l.*, and, to his Daughter, such part of his Real Estate as should remain after his Son should have made his choice, or of the whole of his Real Estate in case his Son should not live to choose his part, as she should choose, but not exceeding the yearly value of 360*l.* Held that the Son was entitled to priority of choice, on attaining 21, and that there was to be no apportionment, although he might not leave for the Daughter Lands of the yearly value of 360*l.*

Annuity.—Testator gave an Annuity, payable half-yearly, to his Son for his Maintenance and Education until he attained 21, and another Annuity, payable in like manner, to his Daughter, (who was adult) during the Son's minority. Held that, as the Son was entitled to a proportional part of his Annuity, from the last half-yearly day of payment up to his attaining 21, the Daughter was entitled to a like proportional part of her Annuity.

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accumulate for the benefit of my said Son *Charles John Bythessea Brome*; and I will and direct the same Bank Annuities to be transferred to my said Son upon his attaining the said age of 21 years: but, in case he shall depart this life under the said age, then I direct that the same Bank Annuities, and all accumulations thereof shall fall into the Residue of my Personal Estate and be disposed of accordingly: And upon further Trust, with and out of the remainder of the said Rents and Profits, to pay to my Daughter, *Cecilia Bythessea Brome*, such Sum of Money, yearly, as with the Dividends and Interest of the Sums of 833 *l.* 6*s.* 8*d.* Bank Three-and-a-Half per Cent. Annuities, and 663 *l.* 8*s.* 4*d.* Bank Three per Cent. Reduced Annuities to which she became entitled, upon her attaining the age of 21 years, under the Will of her late Mother, and which was transferred to her accordingly, will make up to her the clear annual Sum of 400 *l.*, payable half-yearly on the 25th day of March, and 29th day of September in every year, during the Minority of my said Son, the first half-yearly payment to be made on such of those days as shall first happen after my decease; and, as to all the Residue of the Rents, Issues and Profits of my said Real Estate until my said Son shall attain the age of 21 years or until his death under that age, I direct that my said Trustee shall stand possessed thereof upon the same or the like Trusts as are hereinafter declared and contained with respect to the Residue of my Personal Estate. And, in case my son *Charles John Bythessea Brome* shall live to attain the age of 21 years, then I give, devise and bequeath unto my said Son *Charles John Bythessea Brome*, all my Freehold Estate situate at *Croom's Hill, Greenwich*, in the County of *Kent*, to hold the same unto and to the use of my

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said Son, his Heirs and Assigns for ever. I also give and devise, unto my said Son, so much and such part of my *other Real Estate* as my said Son shall choose, but not exceeding, by the yearly Rents and Profits thereof, the yearly value of 350 *l.*, to hold such part of my said Real Estate as shall be so chosen by him as aforesaid, unto and to the use of my said Son and his Assigns, for his life, without Impeachment of Waste; and, from and after the determination of that Estate in his life-time, to the use of the said Sir *Charles Saxton* and his Heirs, during the natural life of my said Son, upon Trust to preserve, &c.; and, from and immediately after his decease, I give and devise the same Hereditaments and Premises unto and to the use of all and every the Children of my said Son lawfully to be begotten, equally to be divided between them as Tenants in Common, and the Heirs of their respective Bodies lawfully issuing; and, in case there shall be a failure of Issue of the Body or Bodies of any such Children, then, as to the Part or Share, Parts or Shares, as well original as accruing, of him, her or them whose Issue shall so fail, to the use of the Survivors or Survivor of such Children, equally to be divided between them (if more than one) as Tenants in Common, and to the Heirs of their respective Bodies; and, in default of such Issue, then, as to one Moiety of the said Hereditaments so to be chosen by my said Son as aforesaid, to the same uses, and upon the same Trusts, for the Benefit of my Daughter *Mary Agnes Bythessea*, now the Wife of *Samuel William Bythessea*, and her Child or Children, as are declared with respect to certain Messuages or Tenements and Hereditaments in *Fleet-street* and *Johnson's-court* in the City of *London*, by the Settlement made previous to her Marriage

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with the said *Samuel William Bythesea*, or such of them as shall be then existing or capable of taking effect; and, as to the other Moiety of the said Hereditaments, I give and devise the same unto my said Trustee and his Heirs, to the same or the like uses as are hereinafter mentioned with respect to such part of the remainder of my said Real Estate as shall be chosen by my said Daughter *Cecilia Bythesea Brome* as hereinafter is mentioned: and I hereby direct that, from and after my said Son *Charles John Bythesea Brome* shall attain the age of 21 years, and shall have made his election as aforesaid, or from and after his decease, in case he shall happen to depart this life without having attained his said age of 21 years, then, I give and devise unto my said Daughter *Cecilia Bythesea Brome*, so much and such part of my said Real Estate as shall remain after my said Son shall have made his choice, or of the whole of my said Real Estate in case my said Son shall not live to choose his part, as she, my said Daughter, shall choose, but also not exceeding, by the yearly Rents and Profits thereof the yearly Value of 360 £., to hold the said Hereditaments so to be chosen by her as aforesaid, unto and to the use of my said Daughter *Cecilia Bythesea Brome* and her Assigns, for her life, without Impeachment of Waste; and, from and after the determination of that Estate by any means whatsoever in her life-time, to the use of the said Sir *Charles Saxton* and his Heirs, during the life of my said Daughter, upon Trust to preserve, &c.; and, from and after her decease, to the like uses for the benefit of her Child or Children lawfully begotten, and with the like Remainders over for the Benefit of the Survivors or Survivor of them as are hereinbefore limited for the Benefit of the Child or Chil

dren of my said Son *Charles John Bythesea Brome*; and, in default of such Issue, then, as to one Moiety of the said Hereditaments and Premises, to the same uses as are hereinbefore declared as to the Hereditaments given and devised unto my said Son, *Charles John Bythesea Brome*, and his Child and Children, and with the like Remainders over on failure of such Issue; and, as to the remaining Moiety or Half-part, to the same uses and upon the same Trusts for the Benefit of my said Daughter *Mary Agnes Bythesea* as are declared, with respect to the said Messuages or Tenements and Hereditaments in *Fleet-street* and *Johnson's-court*, by the said Indenture of Settlement: and I hereby authorize and empower the said *Sir Charles Saxton*, his Executors or Administrators, during the Minority of my said Son *Charles John Bythesea Brome*, and from and after he shall attain the age of 21 years, then I authorize and empower my said Son and my said Daughter, during their respective lives, and the said *Samuel William Bythesea* and *Mary Agnes Bythesea* his Wife, when they shall be in possession of the said Hereditaments and Premises hereinbefore devised to them respectively, to make any Lease or Leases, or to join in making any Lease or Leases of any part or parts of the said Hereditaments and Premises, for any term or number of years not exceeding 14 years, so as upon every such Lease there be reserved the most improved yearly Rent that can be reasonably obtained for the same, payable half-yearly or quarterly, without taking any Fine for granting the same, and so as in every such Lease there be contained a Clause for re-entry in case of non-payment of the Rent or non-performance of any of the Covenants therein contained; and so as the Tenant or Tenants of such Lease or

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Leases do execute counterparts thereof respectively. And, as to all the Residue of my Real Estates whatsoever and wheresoever, after answering the purposes aforesaid, I give and devise the same unto the said Sir *Charles Saxton*, his Heirs and Assigns, upon Trust that he the said Sir *Charles Saxton*, or his Heirs, do and shall, as soon as conveniently may be after my said Son shall have attained his said age of 21 years, or after his decease in case he shall die under that age, sell and dispose of the same, together or in parcels, for the best price or prices that can be got for the same: and, for facilitating such Sale, I do hereby declare that the Receipt or Receipts of my said Trustee for the Purchase-money, shall be a good and sufficient Discharge &c.; and do and shall lay out and invest the Money arising from such Sale or Sales, in the purchase of Bank Three per Cent. Consolidated or Reduced Annuities, in the names of my Executor and Executrix, upon the Trusts hereinafter mentioned respecting the Residue of my Personal Estate. And, as to all the rest residue and remainder of my Money, Money in the Public Funds, Securities for Money, Mortgages in Fee and for years, and the Hereditaments and Premises therein comprised for all my Estate, Right and Interest therein, Goods and Chattels and Personal Estate whatsoever and wheresoever, after payment of my Debts, Funeral and Testamentary Expenses, I give and bequeath the same unto the said Sir *Charles Saxton* and my said Daughter *Cecilia Bythessa Brome*, their Executors and Administrators, upon Trust to call in and receive all such part or parts of my said Personal Estate as shall not, at the time of my death, consist of Money in the Public Funds, and to lay out and invest the same in Bank Three per Cent. Consolidated or Reduced Annuities, in

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their own names, and to stand possessed of such Annuities when purchased, and of all other my Personal Estate, upon Trust to transfer one Third Part thereof unto my said Son *Charles John Bythessea Brome*, upon his attaining the age of 21 years, and, until he shall attain that age, upon Trust to receive the Dividends and Interest thereof, and to apply the same or so much thereof as they shall think proper for the Maintenance and Education of my said Son during his Minority, and to lay out the Surplus thereof (if any) in the purchase of other Bank Annuities, to accumulate for the benefit of the Person or Persons who may eventually become entitled to the Capital from whence such Surplus shall have arisen : and in case my said Son shall depart this life under the age of 21 years, then upon Trust to transfer one Moiety of the said Third Part of the said Residue of my Estate, unto the Trustees of the said Settlement made on the Marriage of my said Daughter *Mary Agnes Bythessea*, upon the Trusts therein mentioned concerning the Sums of 883*l.* 6*s.* 8*d.* Bank Three-and-a-Half per Cent. Annuities and 663*l.* 8*s.* 4*d.* Bank Three per Cent. Reduced Annuities therein comprized, and upon Trust to transfer the other Moiety of the said Third Part of the said Residue of my Estate, unto my Daughter *Cecilia Bythessea Brome*, her Executors, Administrators and Assigns, for her own use and benefit : and, as to one other Third Part of the said Residue of my Estate, upon Trust to transfer the same unto my said Daughter *Cecilia Bythessea Brome*, her Executors, Administrators and Assigns, for her own use and benefit : and, as to the remaining Third Part of the said Residue of my Estate, upon Trust to transfer the same unto the said Trustees of the said Settlement made on the Marriage of my said

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Daughter *Mary Agnes Bythessea Brome*, to be held by them upon the same Trusts as are therein mentioned as to the said several Sums of Bank Annuities hereinbefore mentioned. And I appoint the said Sir *Charles Saxton* and my Daughter *Cecilia Bythessea Brome* Executor and Executrix of this my Will."

The Testator died on the 26th of *April* 1830, leaving *C. J. Bythessea Brome* his eldest Son, his Heir-at-Law and Customary and Gavelkind Heir, and his two Daughters named in his Will, him surviving. *Cecilia Bythessea Brome* afterwards married the Plaintiff *E. Weigall*.

The Testator at his death was seised of a Freehold Estate at *Croom's Hill, Greenwich*, of the yearly value of 87 *l.*, of Freehold Estates of Inheritance, exclusive of the *Croom's Hill* Estate, of the yearly value of 446 *l.* of Leasehold Estates for Lives, perpetually renewable by Custom, held under Leases granted by the Bishop of *London*, of the yearly value of 128 *l.*, of Copyholds of Inheritance, of the yearly value of 136 *l.*, and of a Leasehold Estate for years, perpetually renewable by Custom, of the yearly value of 19 *l.*, being, exclusive of the *Croom's Hill* Estate, of the yearly value of 729 *l.* in the whole.

C. J. B. Brome attained 21 on the 22d of September 1832; and Sir *Charles Saxton* had paid to him or applied for his use, 800 *l.* on account of the allowance of 400 *l.* a year for his maintenance and education during his minority.

On the 10th of October 1832, *C. J. B. Brome* served

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Sir *Charles Saxton* with a written Notice, stating that, under the authority given to him by the Will of his late Father, he elected to take, as his portion of the Estates therein comprised, the parts therein specified of the Freeholds and Copyholds of Inheritance and Leaseholds for Lives, and which were then let at the yearly rent of 350 *l.*

The Bill was filed by Mr. and Mrs. *Weigall* against *C. J. B. Brome*, Mr. and Mrs. *Bythsea*, Sir *C. Saxton* and others, stating that the Plaintiff, Mrs. *Weigall*, was entitled, out of the Rents of the Real Estates, after applying the 400 *l.* a year for the Maintenance and Education of *C. J. B. Brome*, to have made up to her the difference between the Amount of the Dividends of the two Sums of Stock and 400 *l.* a year, during the *Minority of C. J. B. Brome*: that *C. J. B. Brome* had acted upon the Election contained in the Notice, by dealing, as Owner, with some of the Estates comprised therein: that there had been variations in the Annual Value of the Estates at the respective times of the Testator's death, of *C. J. B. Brome* attaining 21, and of his making his Election; and that doubts had arisen as to the time when the value of the Estates ought to be taken, in regard to the Election given by the Will to *C. J. B. Brome*, and also as to what Estates passed by the Will, and the periods during which the Annuities ought to be paid, and as to whether *C. J. B. Brome*, first, and Mrs. *Weigall*, afterwards, in selecting Estates of the annual value of 350 *l.* and 360 *l.*, ought to have regard to the Annual Value thereof at the death of the Testator, at the time when *C. J. B. Brome* attained 21, or at the time of making such selection.

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The Bill prayed that the Will might be established and the Trusts performed ; and that it might be declared which of the Testator's Estates passed by his Will ; and that an Account might be taken of what accrued due, during *C. J. B. Brome's* Minority, in respect of the 400 *l.* a year, and of the Sum which would, with the Dividends of the two Sums of Stock, make the Annual Sum of 400 *l.*, and that what should be found due on those Accounts, might be paid to *C. J. B. Brome* and *Mrs. Weigall* respectively, out of the Rents received by *Sir C. Saxton* ; and that it might be declared that *C. J. B. Brome* had made his Election as to the parts of the Estates which he was entitled to select, and that *Mrs. Weigall* might be at liberty to select, out of the remainder, Estates of the Annual Value of 360 *l.*

C. J. B. Brome, by his Answer, submitted that the Testator's Copyhold Estates, Leaseholds for Lives, and Leaseholds for Years, were not Real Estates according to the true construction of the Will, and did not pass thereby : he admitted that the Estates were, at the Testator's death, of the Annual Value of 729 *l.*, but that the Rents had been since reduced : he submitted that he was entitled to a proportionate part of the 400 *l.* a year, for the time between the 26th of April 1832 and the 22d of September in the same year, when he attained 21 ; and he submitted that, if the Notice included any Estates not well devised, he ought not to be concluded thereby, and he denied that he had dealt, as Owner, with any of the Estates comprised therein, otherwise than by agreeing to let one of those Estates for 14 years, and by receiving some of the Rents.

Sir *E. Sugden* and Mr. *Knight*, for the Plaintiffs :
The questions in this Case are 1st, what passed by

the devise of the Testator's Real Estate : 2d, how long the Annuity to Mrs. *Weigall* ought to be paid : and 3d, at what time the Property ought be valued.

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1st. No one disputes that the Freeholds of Inheritance pass ; and there can be no doubt that the Copyholds and the Leaseholds for Lives will pass by the words "my other Real Estate." *Doe v. Ludlam* (a), *Fitzroy v. Howard* (b). In *Sheffield v. Lord Mulgrave* (c), the Judges held that the words "Real Estate," would include Leaseholds for Lives, unless a contrary intention appeared from the context.

The only question is as to the Leaseholds for Years. Now it is apparent, on the face of the Will, that the Testator intended to pass all his Lands. The Residuary Clause does not seem to be intended to apply to the Leaseholds ; for the Testator directs the Residue to be sold ; and, as the Leaseholds lie intermixed with his other Estates, he could not intend that Clause to apply to them. These Leaseholds are Real Estate, although the Testator had only a chattel interest in them.

2d. Mrs. *Weigall's* Annuity was intended to be given in the same way as that provided for the Son ; and his Annuity, being for his Maintenance and Education, would, certainly, be payable for the time between the last half-yearly day of payment and his attaining 21. The Testator must have meant that the Annuities given to his two unmarried Children, should continue payable, until the division of his Property should take place, when they would be otherwise provided for.

(a) 7 Bing. 275. (b) 3 Russ. 225. (c) 5 T. R. 571.

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3d. The period at which the Property ought to be valued, is the death of the Testator.—In making a Will, a person always looks to the then value of his Property, especially in such a case as this, where the intention of the Testator seems to be to make a fair Division of his Property. The longer the period is postponed, the more uncertain must be the Division.—By the terms of the Will, it is evident that the Testator contemplated that there would be Estates to the amount of 350 *l.* a year for the Son, and to the amount of 360 *l.* for the Daughter, and, if there should be found not to be sufficient for both, there must be an Apportionment.

Mr. *Barber* for the Defendants, Mr. and Mrs. *Bythesa*, contended that the Leaseholds for Years passed by the Residuary Clause.

[The *Vice-Chancellor* :—The Case of *Doe v. Ludlam* decides that Copyholds will pass by a general Devise of Real Estate. The Leaseholds for Years clearly pass, not by the devise of the Real Estate, but by the Residuary Clause. And it is, I think, manifest from the words of the Will, that the Son is to elect when he attains 21, and that the Daughter can elect only out of the Remainder of the Real Estate.]

Mr. *Pepys* and Mr. *Phillimore*, for the Defendant
C. J. B. Brome :

The Testator begins by devising his Real Estates to Sir *C. Saxton* and his Heirs, until his Son shall attain 21 ; and, in other parts of the Will, he speaks of Real Estate. After devising his Freehold Estate at *Croom's Hill* to his Son and his Heirs, he gives to him so much of his *other* Real Estate. He must be considered as

meaning, by those words, his Real Estate of the same description in other places, and the Fee-simple Estates will answer the words of the Will without including the Leaseholds for Lives. If a Testator devises all his *Lands*, Leaseholds for Lives will pass : but all the authorities tend to prove that they will not pass under the general words "Real Estate." Those words are in no way applicable to them. An Estate *pour autre vie*, was not considered by the Law as property : it went to a general Occupant, and was no longer Property when the Grantee died. There might be a Person named to take after the first Grantee, as, for instance, the Heir or the Executor : but he came in, not as inheriting from the Grantee, but as answering the words of the Grant. *Ripley v. Waterworth* (d). An Estate *pour autre vie* required a distinct Statute to enable the Owner to devise it. If it is not devised it is Personal Estate. The Law never recognized it as Real Estate.

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Then how are the Limitations in the Will consistent with the Leasehold Property? The Testator has made a provision for his Family for as long a period as the rules of Law will permit; but he has not given any direction as to the renewal of the Leaseholds. He never could have intended the Limitations in his Will to extend to perishable Interests, or else he would have provided for the continuance of them by renewal. In the devise to the Children of his Son, he uses the word *Hereditaments*. His own Children are the Persons for whose lives the Leases were granted (e). Now there

(d) 7 Ves. 425.

(e) It did not appear from the Brief, that this was so, or that the Leaseholds for Years were intermixed with other Estates, as was stated in the Argument for the Plaintiffs.

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are Limitations to the Children of every one of the Testator's Children; and, consequently, those Limitations must take effect, as to the Children of the survivor, just at the moment when all Interest in the Property determines.

The Case of *Fitzroy v. Howard* does not lead to the decision which the Court is called upon to make on behalf of the Plaintiffs. There the Testator devised "all and every his Lands, Tenements and Hereditaments whatsoever, situate and being in the several Counties of *Middlesex, Hereford and Gloucester*, any or either of them, and all other his Real Estate." So that there was a Local description, and the words "Lands, Tenements and Hereditaments" were also used; and the question was not whether the words "Real Estate" would pass the Leasehold Property, but whether the words "Lands, Tenements and Hereditaments, &c." would pass it; and Lord *Lyndhurst* decided that it did pass by those words: all that he said with respect to the words "Real Estate," was that they did not cut down the words "Lands, Tenements and Hereditaments." In *Thompson v. Lady Lawley* (f), Lord *Eldon*, C. J. says: "When we find Limitations in a Will inapplicable to Personal Estate, though we are not thereby authorized to say that the Personal Estate shall not pass, provided the Testator has used words clearly sufficient to pass it, yet the acknowledged inapplicability of those Limitations to Personal Estate, is a circumstance from which the intent may be collected, if the words of devise are ambiguous. In an accurate sense, when a man says "my Lands and Hereditaments," he means those which are

(f) 2 Bos. & Pul. 303. See 309.

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throughout his own. When, therefore, we see Limitations which apply to Real Estate as distinguished from Personal Estate, or even when we find that, by holding the latter to be included in the general Devise, the wish imputed to the Testator to give it to the same Person as the Freehold, may not, by virtue of such Limitations, be gratified for above one moment, we may consider the nature of the Limitations as affording strong evidence that the Testator really had not the intention that the Personal Estate should pass." These words are as applicable to Leaseholds for Lives, as they are to Leaseholds for Years. Perishable Interests will not pass by general words.

The Court has decided that the Son is entitled to priority of Election, and that the time of Election is his attaining 21; and we submit that that Election must be made, simply, out of the Fee-simple Estates.

Mr. *Gresley* for the Defendant Sir *C. Saxton*.

THE VICE-CHANCELLOR:

The Testator has, in the first instance, given all his Real Estate, whatsoever and wheresoever; and the first question is, what is the meaning of those words. Now, under a *fieri facias*, the Sheriff can seize Personal Estate only. He cannot take Leaseholds for Lives; and, therefore, in the legal acceptation of the words "Real Estate," Freeholds for Lives are comprehended.

It has been admitted that the Copyholds pass. Now the Testator devises part of his Real Estate to his Son for his life, without Impeachment of Waste, and gives a power of leasing. These parts of the Will are, however,

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inapplicable to the Copyholds; but, nevertheless, they do not prevent their passing. The mere circumstance that the mode of dealing with the Property, is inapplicable to a particular part of it, will not prevent the passing of that part which is of a particular description. The Testator has given a Commentary on his own words. He first gives to his Son all his Freehold Estate at *Croom's Hill*, and then he gives to him "so much of my *other* Real Estate, &c." This shows that he meant, by the general words used in the commencement of his Will, the same thing as if he had devised, to the Trustee, all his Freehold Estate, and all his Real Estate whatsoever.

In *Fitzroy v. Howard*, Lord *Lyndhurst* does not mean to say that the words "Real Estate" will not pass Leaseholds for Lives, but merely that there were other words, in the Will, under which the Leasehold Estate would pass.

There is, however, more in this Will. The Testator, in the Leasing Power, has authorized his Son and Daughter, when they shall be in possession of the Hereditaments and Premises devised to them, to make any Lease or Leases of any parts of the said Hereditaments and Premises. These words show that the Testator contemplated that he had devised, not only Hereditaments, but also other things, which were not inheritable. My opinion, therefore, is that the Freeholds, Copyholds, and Leaseholds for Lives passed by the words "Real Estate," but that the Leaseholds for Years did not pass.

The Election made by the Son is valid as against

him; and, as he is clearly entitled to a proportional part of his Annuity, for the time between the last half-yearly day of payment and his attaining Twenty-one, the Daughter also is entitled to a proportional payment of her Annuity for the same space of time; and, if the surplus Rents received during the Son's minority, are not sufficient to pay those Annuities in full, they must be apportioned according to the Annuities.

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MATHER v. THOMAS.

BY Lease and Release of the 30th of April and 1st of May 1783, *Rice Thomas* mortgaged certain Messuages, Lands and other Hereditaments situate in the Isle of *Anglesey*, to *Joseph Crewe*, in Fee, for securing 1,000 l. and Interest.

1833:
29th April.

Will.
Construction.
Mortgage.

Joseph Crewe, by his Will dated the 19th of April 1790, gave to his Servant, *Martha Jones*, and her Assigns, for her life, an Annuity of 20 l., to be issuable and payable out of the Real and Personal Estate thereafter by him given, devised and bequeathed to or in Trust for *John Capper*; and, after giving several specific and pecuniary Legacies, he gave and devised, to the said *John Capper* and his Assigns, for his life, subject and charged with the Annuity to *Martha Jones* and also with some other Annuities, all his several Messuages or Dwelling-houses, Shops and Hereditaments, with their Appurtenances, situate on the East side of *Northgate-street*, in

A Testator, after several Devises and Bequests, gave, devised and bequeathed all his Messuages, Chattels real, Ready Money, Securities for Money, Debts, and Personal Estate to A. and B., their Heirs, Executors, Administrators and Assigns, upon certain Trusts: Held that the Legal Estate in

the Premises mortgaged to the Testator in Fee, passed to A. and B., the Trusts declared not being repugnant to that Construction.

In re Kings Mortgage
5 Dec. V. 647.

12

Re. Jidd. 9. Mare 415

Knight v. Robinson 2 Ray V. 508.

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the City of *Chester*; then in the several holdings or possessions of the Persons therein named, and also all his several Messuages or Dwelling-houses, Shops, Rooms, Stables, Hereditaments and Premises, situate on the East side of the same Street, in the holdings or possessions of the Persons therein named; and also all his Eighth Part or Share of and in the Works for supplying the City of *Chester* with Water, and of the Buildings, Engines, and Appurtenances thereto belonging, to hold, subject and charged as aforesaid, unto *John Capper* and his Assigns, for his life, without Impeachment of Waste, and, from and after the decease of *John Capper*, the Testator gave and devised the said Premises, subject and charged as aforesaid, unto and amongst all and every the Child and Children of the said *John Capper*, equally, share and share alike, as Tenants in Common, and to their respective Heirs; and, after devising all his Estate and Interest in certain Messuages or Dwelling-houses, Shops, Coach-houses, Stables, and his Part or Share of the Linen Hall, in the City of *Chester*, and all other the Premises which he held under the Dean and Chapter of *Chester*, subject to the Rents and Covenants, in the original Leases thereof granted, reserved and contained, and to the several Annuities in his Will mentioned, unto *William Currie* and *Richard Mytton*, their Executors and Administrators, during the continuance of such Leases, in Trust for *John Capper*, during his life, and, after his death, for his Children, as Tenants in Common, and their Executors and Administrators, and, after bequeathing some other pecuniary Legacies, the Testator proceeded thus:—"And, as for and concerning all my Messuages or Dwelling-houses, Buildings, Chattels real, Ready Money, *Securities for Money*, Debts to me owing, and Personal Estate of any nature

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or kind soever, (save what are hereinbefore by me otherwise disposed of,) I give, devise and bequeath the same and every part thereof, unto the said *William Currie* and *Richard Mytton*, their *Heirs*, Executors, Administrators and Assigns, upon the Trusts hereinafter mentioned and declared of and concerning the same, (that is to say) in Trust that they the said *William Currie* and *Richard Mytton*, or the Survivor of them, and the Executors and Administrators of such Survivor, do and shall, of their own proper authority, and at their own discretion, lay out, invest, and place so much thereof as consists of Money, in the names or name of them the said *William Currie* and *Richard Mytton*, or the Survivor of them, or the Executors and Administrators of such Survivor, in the Public Stocks or Funds, or in Government or other real Securities at Interest, and to be, from time to time, called in, altered and varied by them as occasion shall require, in which case the Receipt or Receipts of my said Trustees shall be a good and sufficient discharge or discharges for so much of the said Money so called in as shall be therein expressed or acknowledged to be received, and the Person or Persons paying in the same, shall not, nor shall his, her, or their Heirs, Executors, Administrators or Assigns, afterwards be obliged to see to the application of such Money, or be accountable for any loss, misapplication or non-application thereof, or of any part thereof respectively: and upon this further Trust, that they the said *William Currie* and *Richard Mytton*, or the Survivor of them, or the Executors or Administrators of such Survivor, shall and do pay, apply, and dispose of the clear yearly Dividends, Interest or Produce of the Money so to be invested, and also of the Rents, Issues and Profits of my said last devised Chattels real, as the same shall,

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from time to time, arise and be received, unto the said *John Capper* and his Assigns, for and during the term of his natural life, and, from and immediately after his decease, upon further Trust that they my said Trustees, or the Survivor of them, or the Executors or Administrators of such Survivor, do and shall pay and divide such Residue, or assign or transfer the Securities which shall be then subsisting for the same, unto and amongst all and every the Child and Children of the said *John Capper* that shall be living at the time of his decease or born in due time afterwards, share and share alike." And the Testator appointed *Currie* and *Mytton* Executors of his Will.

The Testator died in 1801; and the 1,000 £ remained unpaid at his death.

The question was whether the Legal Estate in the Mortgaged Premises, passed, by his Will, to *Currie* and *Mytton*.

Mr. *Pepys* and Mr. *Lynch*, for the Plaintiffs, said that the words "Securities for Money," were sufficient to pass the Mortgaged Property; *Crips v. Grysil* (a); especially as the word "Heirs" occurred in the Devise; that there was nothing inconsistent in the Trusts of the Will, to prevent the Mortgaged Estate from passing; but, on the contrary, it was necessary that *Currie* and *Mytton* should take the Legal Estate, to enable them to perform the Trusts: that this Case fell within the reasoning of *Bayley J.* in *Galliers v. Moss* (b), and was

(a) Cro. Car. 37. See this Case stated from the Record, 9 Barn. & Cress. 282.

(b) 9 Barn. & Cress. 267.

distinguishable from *Sylvester v. Jarman* (c), where the Property devised was subjected to the payment of Debts, which was a purpose to which a Mortgaged Estate was not applicable. *Lord Braybrooke v. Inskip* (d); *Renvoize v. Cooper* (e).

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Mr. Knight and Mr. Cockerell, *contrà* :

This Case is not distinguishable from *Galliers v. Moss*; and your Honor cannot decide that the Legal Estate in the Mortgaged Premises passed under this Will, without over-ruling that Case. There the Trusts were to be performed by the Trustees and their Heirs.

[The Vice-Chancellor :—This Case is the converse of *Galliers v. Moss*; for, here, the devise is to the Trustees and their Heirs, and the Trusts are to be performed by them and their Executors. Supposing that the Testator had had other Freehold Estates than those devised in the preceding part of his Will, would not they have passed by the Residuary Clause? Here the word “Heirs” is applicable to the words “Messuages or Dwelling-houses;” but, in *Galliers v. Moss*, there were no such words. The opinion expressed by Sir John Leach, V. C., in *Renvoize v. Cooper*, was extra-judicial, and was not necessary to the decision of the Case.]

Mr. G. Richards, appeared for *Rice Thomas*.

The Vice-Chancellor intimated his opinion to be that the Legal Estate in the Mortgaged Premises, passed by the words “Securities for Money;” but said that he could not, with propriety, decide the Case in the face of

(c) 10 Price, 76. (d) 8 Ves. 417. (e) Madd. & Geld. 371.

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the decision of the Court of King's Bench in *Galliers v. Moss*; and, therefore, the proper course would be to send a Case for the opinion of another Court of Law.

A Case was accordingly sent to the Court of Common Pleas.

The Judges of that Court returned the following Certificate: "We have heard this Case argued by Counsel and considered it; and we are of opinion that the Legal Estate in the Premises comprised in the Indenture of Mortgage of the 1st day of May 1783, passed, under the Will, to *W. Currie* and *R. Mytton* and the Survivor of them, by the devise of the Testator's Securities for Money to the said *W. Currie* and *R. Mytton*, their Heirs, Executors, Administrators and Assigns (*f*).

N. C. Tyndal.

J. A. Park.

S. Gaselee.

J. B. Bosanquet."

On the Case coming on again before the *Vice-Chancellor*, on the 2d July 1833, his *Honor* made a declaration in the terms of the Certificate.

(*f*) 10 Bing. 44. See *Le Gros v. Cockerell*, ante Vol. V. 384, and *In re Tyas*, *ibid.* 451.

KNIGHT v. KNIGHT.

1834 :
16th April.

By the Settlement made in contemplation of the Marriage between *Robert Giveen* and *Caroline Lambert*, dated the 26th of July 1824, the Lady assigned and transferred to Trustees, a messuage in *Wimpole-street* and certain Sums of Money and Stock, in Trust, after the Marriage, to receive the Income of the Trust Property, during her life, and pay the same into her hands, for her own sole and separate use and benefit, or as she should, by writing under her hand, notwithstanding her Coverture, direct or appoint, but no payment to be made by anticipation or before the same should become due. And it was declared that the said Income should not be subject or liable to the Power, Control, Debts, Forfeiture, Intermeddling, Engagements or Incumbrances of *Robert Giveen her intended Husband*, in any manner whatsoever, and that the Receipt or Receipts of *Caroline Lambert*, signed with her own hand, or of such Person or Persons as she should appoint in Writing, should, from time to time, be a good and sufficient Discharge or Discharges for the same, and, from and immediately after her decease, in case *Robert Giveen* should survive her, in Trust to permit and suffer him to receive and take such Income, for his life, and, from and after the decease of

Settlement..
Construction.
Separate Use.

By a Marriage Settlement, Money and Stock were assigned to Trustees, in Trust, to receive the Income during the Life of the Lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her Coverture, but no Payment to be made by anticipation, and it was declared that the Income should not be subject to the Debts, &c. of *R. G., her intended Husband*, and, after her decease, in case he should survive, in Trust to

permit him to receive the Income for his life, &c. The Husband died in the lifetime of his Wife, and she married again. Held that the Provision for the separate use of the Lady without anticipation, was confined to the first Marriage.

Grady v. Hughes 8 Hen. 44
2 Jaffes's Settlement 1 H. & 265

1834.

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the Survivor of them, in Trust for the benefit of all and every the Children or Child of *Caroline Lambert* by *Robert Giveen* or any future Husband after his decease, in manner following, (that is to say) in case there should be but one Child of *Caroline Lambert* by *Robert Giveen* or any future Husband as aforesaid, the whole of such Trust Premises and the Income thereof to belong to such Child, and to be vested in him or her at the usual periods, and to be transferred or assigned to him or her, at the same time, if the same should happen after the decease of the Survivor of them the said *Robert Giveen* and *Caroline Lambert*; but, if the same should happen in the lifetime of them or the Survivor of them, then immediately after the decease of such Survivor: and, if there should be two or more Children of *Caroline Lambert* by *Robert Giveen* her intended Husband, or any future Husband, then the whole of such Trust Premises and the Income thereof, to be for the Portions of such two or more Children, and to be divided between or among them in equal Shares, and the Shares to be vested in them respectively at the usual times, and to be transferred or assigned to them at the same times, if the same should happen after the decease of the Survivor of *Robert Giveen* and *Caroline Lambert*, but if not, then immediately after the death of the Survivor: and in case there should be no Child or Issue of *Caroline Lambert* who, under the Trusts thereinbefore declared, should become entitled to a vested interest in the Trust Premises, then in Trust that the Trustees should, after the decease of the Survivor of *Robert Giveen* and *Caroline Lambert*, his intended Wife, stand possessed of the Trust Premises, in Trust for such Persons, &c. as *Caroline Lambert*, notwithstanding her Coverture, by her

Will, (which, notwithstanding her Coverture, she was thereby, and by the said *Robert Givcen* her intended Husband, authorised and empowered to make,) should bequeath the same, and, in default of such Bequest, in Trust for the Next of Kin of *Caroline Lambert*, as if she had died a *feme sole* or had not been married, according to the Statute of Distributions.

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Robert Givcen having died, his Widow married *Charles Knight*.

The Bill was filed, by Mr. *Knight*, against his Wife and the surviving Trustee of the Settlement of July 1824, insisting that the Trusts for the separate use of, and against anticipation by Mrs. *Knight*, were only applicable to, and ceased with her Marriage with *R. Givcen*, and, that on his death, she became entitled to receive, during her life, and to alien and charge the Income of the Trust Premises, and that her Marriage with the Plaintiff, was an Assignment to him, in Law, of such Income. The Bill prayed that the Plaintiff might be declared to be entitled to receive and assign the Income of the Trust Premises, as he should think proper, during the joint Lives of himself and his Wife, and that the surviving Trustee of the Settlement might be decreed to pay the same to the Plaintiff or his Assigns, accordingly.

Mrs. *Knight*, by her Answer, submitted to the Judgment of the Court, whether she was or not entitled to the Income of the Trust Premises, for her separate use, without having power to anticipate the same.

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Sir *Edward Sugden* and Mr. *Chandless*, for the Plaintiff, said, first, that a Trust for the separate use of a Woman, with a restraint on Alienation, if created with a view to a particular Marriage, was good for that Marriage; but, if it was created with a view to every Marriage that a Woman might contract, it was bad: that the provision was introduced in order to enable a married Woman to enjoy Property as if she were *sui juris*: that the moment the Marriage ceased, the object for which the provision was introduced ceased; and, therefore, it would be absurd to hold that a Trust could exist for the separate use of a Woman who was under no disability.

Secondly, that there was not a word in the Settlement, that did not point to the first Marriage only, and, therefore, the provisions of the Settlement could not be extended beyond it. *Newton v. Reid* (a); *Woodmeston v. Walker* (b); *Jones v. Salter* (c); *Tudor v. Samyne* (d); *Barton v. Briscoe* (e).

Mr. *Knight* and Mr. *Kindersley*, for the Defendants, relied on *Beable v. Dodd* (f), and on the Judgment of the *Master of the Rolls* in *Woodmeston v. Walker*, and added that, if a Trust for the separate use of a Woman, could not be created except with a view to a particular Marriage, it would be out of the power of a Father having an unmarried Daughter, to make a provision for her, by his Will, so as to guard her from the extravagance of a future Husband; and that, as a Trust might

(a) *Ante*, vol. IV. p. 141.

(d) 2 Vern. 270.

(b) 2 Russ. & Myl. 197.

(e) Jacob, 603.

(c) 2 Russ. & Myl. 208.

(f) 1 T. R. 193.

be created for the separate use of a married Woman, so a similar Trust might be made to take effect on the Marriage of a single Woman.

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The VICE-CHANCELLOR :

The Settlement does not contain any declaration of Trust in favour of this Lady, in case her intended Husband should die in her lifetime. The first Limitation is to the Trustees, in Trust, during the life of *Caroline Lambert*, to receive the Interest, Dividends, and Annual Produce of the Trust-Property, Monies, Stocks, Funds and Securities, and pay the same into the hands of the said *Caroline Lambert*; and the Trust next declared, is to take effect from and immediately after the decease of the said *Caroline Lambert*. So that there is no expression of Trust for her, during that part of her life that might endure beyond the life of her intended Husband. Consequently, we must look at the first words in the Settlement as constituting a Trust for the whole of her life. Then words of modification and restriction are added: "To and for her own sole and separate use, or as she shall, by writing under her hand, notwithstanding her coverture, appoint, but no payment to be made by anticipation or before the same shall become due." The words: "notwithstanding her Coverture," must mean the Coverture then in contemplation. And then it is declared that: "the said Income, Interest, Dividends and Annual Produce, shall not be subject or liable to the Power, Control, Debts, Intermeddling or Engagements of the said *Robert Giveen*, her intended Husband." That Clause, manifestly, alludes to the intended Coverture.

It appears to me, therefore, on the face of this Instru-

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ment, that all the machinery by which the Income of the Trust Property is secured for the separate use of this Lady, without anticipation, was introduced into the Settlement, with reference to that Marriage only which she was then about to contract.

Whatever may be thought of *Newton v. Reid*, it is supported by the decision of the *Lord Chancellor* in *Woodmeston v. Walker*.

In my opinion this is the case of a Trust created for the life of this Lady, with Limitations and Restrictions which were binding during her Marriage with her first Husband, but not beyond it: and, consequently, her present Husband is entitled to receive and dispose of the Income of the Trust Property during the Coverture*.

* See the next Case.

1835:
20th January.

BENSON v. BENSON.

Will.
Construction.
Separate Use.

Testator directed the Interest of 10,000*l.* to be for the separate Use of his Daughter

Jane Lane, the Wife of *J. Lane*, for her life, free from the Debts of her Husband. The Husband died, and his Widow married again. Held that the Trust for her separate use ceased on the death of her first Husband.

Qu. Whether a Trust for the separate use of a single Woman is valid

THOMAS HOWARD GRIFFITH, by his Will dated the 1st of August 1821, after devising a Plantation in *Barbadoes*, called *Windsor*, and all other his Estate and Property of whatever nature, whether Real, Personal, or mixed, and whether in *Barbadoes*, *England*, or elsewhere, to his eldest Son, the Defendant, *Thomas*

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Griffith, his Heirs, Executors, Administrators and Assigns, subject to the payment of his Debts, Funeral and Testamentary Expenses and Legacies, proceeded thus: "I do hereby charge and make my said Plantation called *Windsor*, and the Lands, Buildings, Slaves and Stock thereof liable to the payment of the Sum of 10,000 *l. Barbadoes* currency, at lawful Interest from the day of my death, to the following uses, that is to say, the Annual Interest to accrue thereon to be to and for the sole, separate and exclusive use and benefit of my Daughter, *Jane Abel Lane, the Wife of John Branford Lane, Esq.*, for and during her natural life, totally free and independent of the Debts, Control or Engagements of *her Husband*, and for which her Receipt alone, or the Receipts of such Person or Persons as she shall alone appoint, from time to time, to be a sufficient discharge; and I do direct that such Interest shall be paid to her at the end of every Six Months, either in this Island or in England as she shall desire." And the Testator disposed of the 10,000 *l.*, after the death of his Daughter, in manner therein mentioned*.

The Testator died in 1823. *John Branford Lane* died in 1829; and his Widow intermarried with the Plaintiff in December 1831.

The Bill prayed that it might be declared that the Plaintiff, on his Marriage, became absolutely entitled to receive the Interest which, during the life of the Defendant, his Wife, should accrue due in respect of the Legacy of 10,000 *l. Barbadoes* currency, and that the

* The Will was set forth, as above, in the Bill: but The *Vice-Chancellor* read and commented upon some of the subsequent parts of it, which are stated in his Judgment.

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balance of Interest then due, and all the Interest which, during the life of his Wife, should accrue due, might be paid to him.

The Defendants put in a general Demurrer.

Mr. *Knight* and Mr. *Blenman*, in support of the Demurrer :

There is no case that decides that an enduring Trust may not be created for the separate use of a married woman. There is a *dictum* to that effect in *Massey v. Parker* (a); but it was extra-judicial: the point decided was that the language of the Will did not create a Trust for the separate use of the Testatrix's Granddaughter. *Woodmeston v. Walker* (b) merely decides that, where a Trust is created for the separate use of a *single* woman, with a Clause against anticipation, she may alienate the Property *before Marriage*. In *Barton v. Briscoe* (c), it was decided that the Clause restraining a married woman from anticipating her separate Property, operates during the continuance of the Coverture only. That Clause is of modern invention; and Trusts for the separate use of married Women, and restraints on Alienation by them, are wholly independent of each other. *Acton v. White* (d); *Adamson v. Armitage* (e); — *v. Lyne* (f); and *Anderson v. Anderson* (g), are, all of them, Cases in which the Clause against anticipation would have been inopera-

(a) 2 Myl. & Keen, 174.

(b) 2 Russ. & Myl. 197.

(c) Jacob's Rep. 603.

(d) 1 Sim. & Stu. 429.

(e) 19 Ves. 416.

(f) 1 Younge, 562.

(g) 2 Myl. & Keen, 427.

tive; but effect was given to the Trust for separate use.

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Mr. *Kindersley* and Mr. *Chandless*, in support of the Bill:

There are two points in this Case, on either of which, if we are right, this Demurrer must be overruled: 1st. By the language of the Will, the exclusion of the marital right is confined to *J. B. Lane*, and is not extended to a second Husband. The *dicta* in *Massey v. Parker* (*h*), and the decisions in *Tyler v. Lake* (*i*), and *Knight v. Knight* (*h*), show that, in order to exclude the marital right, the intention must be clear. Here the Testator charges his Plantation, called *Windsor*, with the payment of 10,000 *l.*, "the Interest to be for the sole, separate and exclusive use and benefit of my Daughter, *Jane Abel Lane*, the Wife of *John B. Lane*, for and during her natural life, totally free and independent of the Debts, Control, or Engagements of her Husband." This, plainly, excludes the marital right of that Husband only whom the Testator has just named.

2ndly: Supposing that there was an intention, apparent on the face of the Will, to exclude the marital right, not only of *J. B. Lane*, but of all future Husbands of this Lady, that intention could not prevail. The two decisive Cases on this point, are *Woodmeston v. Walker*, and *Massey v. Parker*. The reasoning of the *Master of the Rolls*, in the latter Case, is extremely important (*l*). And, though it was said that the opinion expressed by that learned Judge was extra-judicial,

(*h*) 2 Myl. & Keen, 174.

(*h*) *Ante*, p. 121.

(*i*) *Ante*, Vol. IV. 144, and

(*l*) See 2 Myl. & Keen, 182,

2 Russ. & Myl. 183.

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because the words of the Will were not sufficient to exclude the marital right, yet his *Honor* held that, if the intention to give the income of the Property for the separate use of the Grand-daughter, had been sufficiently expressed, still, upon principle, he should have had no doubt that the right of the Husband was not excluded. In *Adamson v. Armitage*, *Anderson v. Anderson*, and — *v. Lyne*, the question was not brought to the attention of the Court. The law was taken to be settled, and the point here raised, was not discussed.

[The *Vice-Chancellor* : — Suppose a Father seised in Fee, devises to Trustees and their Heirs, in Trust for the separate use of an Infant Daughter, and she attains 21 and marries, could the Husband file a Bill, against the Trustees, to have the legal Estate conveyed to him, and so defeat the intention of the Testator?]

Yes: but the Daughter may, if she chooses, prevent the mischief, by settling the Property, previously to her Marriage, to her separate use.

[The *Vice-Chancellor* :—It is very important to Persons having Daughters and female relations for whom they wish to provide, and whose interests it may be necessary to protect, that the principle which you contend for, should not be established until the subject has been well considered. Regard ought also to be had to the practice of Conveyancers. As far as that practice goes, Trusts like the present, have prevailed for more than a century.]

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The Conveyancers now consider the Law to be settled as we contend for. *Newton v. Reid* (m), and the other Cases in which the restraint on alienation has been held to be void, closely apply to the present Case. But *Massey v. Parker* is a direct authority that a Trust for separate use, can be created in favour of a married woman only; and this Demurrer cannot be allowed without overruling that Case.

[The *Vice-Chancellor* :—In *Brandon v. Robinson* (n), Lord *Eldon* decided that the Clause against anticipation was inconsistent with the enjoyment of the Property given, and was, therefore, void : but the question here is, simply, whether you can protect an unmarried Woman, in Equity, by creating a Trust for her separate use. *Newton v. Reid* did not interfere with that question. There the married Woman and her Husband combined to assign her separate Property ; and no one doubted that they might do so, unless they were prevented by the Clause against Alienation ; and the decision only went to this, that the restriction on Alienation was rendered ineffectual by the context of the Will, but no opinion was expressed as to the effect or operation of the previous words.]

Supposing the Trust in this Case should be held to be good, then we submit the Marriage is, in effect, an Assignment of the Wife's Property to the Husband.

[The *Vice-Chancellor* :—That is not the Law : for, if the Husband does not assign the Chattels real of his

(m) *Ante*, Vol. IV. p. 141.

(n) 18 Ves. 429, and 1 Rose, 197.

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Wife, during the Coverture, they survive to her on his death. So, if the Husband does not recover, during the Coverture, the *Choses in action* of his Wife, they will not go to his Executor, but survive to her; and, if she dies in his lifetime, he must take out Letters of Administration to her.]

Mr. *Knight*, in reply :

In *Beable v. Dodd* (o), the words of the Will were similar to those in the present Case, and *Willes* and *Ashhurst*, Justices, decided, on the construction of those words alone, without reference to the Codicil, that the restriction was not confined to the then Husband, but was meant to extend to any future Husband. Here the Trust for the separate use of the Daughter, is to continue *during her natural life*, free from the Debts, &c. of her Husband. The Testator does not say “her *said* Husband;” but these latter words must be connected with the former. Besides, when the Testator had said, “for her separate use,” he had said enough; for, though the subsequent words are familiarly added, they are surplusage: why then are they to cut down the previously expressed general intention? Again, the Testator does not say that the Receipts shall be sufficient discharges during the life of the Husband, but during the life of his Daughter. It is clear, therefore, on the face of the Will, that the Testator meant the Trust to extend not only to the then, but to any future Husband.

Both practice and authority are against the second point contended for on the other side.

The VICE-CHANCELLOR :

I should be extremely unwilling to decide upon the second point, unless I were obliged to do so. The language of the Will in this Case, relieves me from that necessity: for I think that the words of the Will must be taken to create a Gift for the separate use of this Lady, during the life of her first Husband only. The Testator, after charging his Plantation with the 10,000*l.*, directs the annual Interest to be to and for the separate use of his Daughter *Jane*, the Wife of *John Branford Lane*, for her life, totally free and independent of the Debts, Control or Engagements of her Husband. This means, according to the plain sense of the words, her Husband *J. B. Lane*, and no other Person. The Will then proceeds as follows: "And, from and after the death of my said Daughter, *Jane Abel Lane*, I do give and bequeath and dispose of the said Sum of 10,000*l.*, unto and amongst all and every the Children of my said Daughter by her said Husband the said *J. B. Lane*." That fixes the Testator's meaning to be the Husband whom he had before spoken of. The Will then goes on thus: "Save and except the Child who shall be entitled to and become possessed of *Castle Grant* Plantation, situate in the parish of *St. Joseph* in this Island, and of which the said *John Branford Lane* is now seised and possessed for the term of his natural life, to be equally divided between and amongst them, share and share alike, at the age of 24 years, if Sons, and at the said age of 24 years, or day or days of Marriage, if Daughters, whichever event shall first happen, and should any or either of the Children of my said Daughter, being a Son or Sons, depart this life under the said age of 24 years, or, being a Daughter or Daughters, shall depart this life under the said age of

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24 years and unmarried, then and in such case the Part, Share and Proportion of him, her or them so dying, shall go to and be equally divided amongst his, her or their surviving Brothers and Sisters, and be paid at the same time with his, her or their original Part, Share and Proportion. Provided always, and my will and meaning is that, in such survivorship, the Child taking or being entitled to take the said *Castle Grant* Plantation, shall not be included or participate therein: and should it so happen that all the Children of the said *Jane Abel Lane* shall depart this life, being Sons, under the age of 24 years, or Daughters under that age and unmarried, then I do direct that the said Sum of 10,000*l.* shall sink in my said Plantation called *Windsor* for the benefit of my Son *Thomas*: or should it happen that there should be a Survivor of the Children of my said Daughter, and such Survivor should take or be entitled to take the said *Castle Grant* Plantation, in such case the said sum of 10,000*l.* shall not go or belong to such Survivor, but the same shall, in manner as aforesaid, sink in the said Plantation for the benefit of my said Son *Thomas* and his Heirs. And I do direct, and my will and meaning is that, should any or either of the Children of my said Daughter attain the age of 24 years, being a Son or Sons, or, being a Daughter or Daughters, attain that age or be married in her life-time, that his, her or their Part, Share and Proportion in the said Sum of 10,000*l.*, shall be a vested Interest, although the payment thereof be postponed until after her death, save and except the Child who shall take or be entitled to take the *Castle Grant* Plantation, who, as I have hereinbefore declared, is not to participate in the said Sum of 10,000*l.*; but if, at the time of the death of my said Daughter, any or

either of her Children entitled as hereinbefore directed, to a Part, Share or Proportion of the said Sum of 10,000*l.*, shall not be of the age of 24 years, if Sons, and shall not be of the like age or married, if Daughters, then I do direct that, until those events shall happen, the Annual Interest to accrue on the said Sum of 10,000 *l.* shall be paid, applied and disposed of for and towards their Maintenance and Education in the proportion of their respective Shares of and in the said principal Sum of 10,000 *l.*"

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It seems, therefore, that the Testator took it for granted that the Husband would outlive his Daughter, and that it never occurred to his mind that his Daughter might survive her Husband.

I am not, therefore, under the necessity of deciding the second Point, for I am of opinion that, by the words of this Will, no Trust was created for the separate use of this Lady, except during her Marriage with *J. B. Lane**.

* See the preceding Case.

1834 :
11th April.

*Power of Sale
and Exchange.
Marriage
Articles.
Construction.*

By Marriage Articles, it was agreed that Estates should be settled in strict Settlement, and that there should be contained, in the Settlement, Powers to the Husband, to charge the Estates, by way of Mortgage, with a certain Sum, and also to charge the Estates with another Sum for younger Children, and to create Terms for raising those Sums, and likewise all other Powers, &c. usually inserted in Settlements of the like nature, and which should be proper for effecting any of the Purposes aforesaid. Held that a Power of Sale and Exchange might be introduced into the Settlement.

HILL v. HILL.

BY an Indenture made the 21st of July 1831, between *Arthur Clegg*, Esquire, of the one part, and *Sir Rowland Hill*, of *Hawkstone*, in the County of *Salop*, Bart., of the other part, after reciting that a Marriage had been agreed upon between *Sir R. Hill* and *Ann Clegg*, the Granddaughter of *Arthur Clegg*, and that it had been agreed that *Sir R. Hill* should, within six months from the date of the Indenture, convey and assure all the Manors, Towns, Villages, Messuages, Farms, Lands, Tithes and Hereditaments of him the said *Sir R. Hill*, situate in the County of *Salop* and elsewhere, to the uses thereafter expressed, and that *Arthur Clegg* had agreed to pay certain Debts and Engagements of *Sir R. Hill*, secured upon the said Estates in the County of *Salop* and upon the Bonds and Promissory Notes of the said *Sir R. Hill*, to the amount of 100,000 l., in manner thereafter expressed : *Sir R. Hill* covenanted with *Arthur Clegg*, to convey all the Manors, Towns, Villages, Capital or other Messuages, Farms, Lands, Advowsons, Tithes and Hereditaments of him the said *Sir R. Hill*, situate in the County of *Salop* or elsewhere in *England*, to Trustees, to be mutually agreed upon between the Parties, and their Heirs, subject to such Mortgages or other Charges and Incumbrances as should affect the same after the application of the Money thereafter covenanted by *Arthur Clegg* to be paid and applied as thereafter mentioned, to the use of *Sir R. Hill* for life, without Impeachment of Waste, with

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remainder to Trustees to preserve Contingent Remainders, with remainder to the first and other Sons of Sir *R. Hill* by *Ann Clegg* and their Issue, for the Estates thereafter mentioned, that is to say, every such Son to take the said Manors and other Hereditaments, in the order of his Birth, for life, with remainder to Trustees to preserve Contingent Remainders, with remainder to the use of his first and every other Son, severally and successively, and in Tail Male, remainder to the use of the first and other Daughters of Sir *R. Hill* by *Ann Clegg* and their Issue, for the Estates thereafter mentioned (that is to say) every such Daughter respectively to take the said Manors and other Hereditaments in the order of her Birth, for life, with remainder to Trustees to preserve Contingent Remainders, with remainder to the use of her first and every other Son severally, successively, and in Tail Male, with remainder to the use of the first and other Daughters of the first and other Sons of Sir *R. Hill* by *Ann Clegg*, severally and successively, and in Tail, with remainder to the use of the first and other Daughters of the first and other Daughters of Sir *R. Hill* by *Ann Clegg*, severally, successively, and in Tail, with the ultimate remainder to the use of Sir *R. Hill* in Fee: And that, in such Settlement, Conveyances and Assurances, should be contained a power for Sir *R. Hill* to charge the Manors and other Hereditaments, by way of Mortgage, with any Sum or Sums of Money, not exceeding, in the whole, the Sum of 80,000 *l.*, which *Arthur Clegg* should, at any time or times, advance or lend to Sir *R. Hill*, for the purpose of paying off and discharging all or any of the Debts and Incumbrances then owing by Sir *R. Hill*, and which should remain unpaid after the application of the Sum of 100,000 *l.* thereafter covenanted by *Arthur Clegg*

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to be paid and applied; and also a power for Sir *R. Hill* to charge the Premises with any Sum or Sums of Money, not exceeding 30,000*l.*, for the benefit of any one or more of the younger Children of the Marriage, and to create Terms of Years for raising such several Sum or Sums of Money, "*and likewise all other Powers, Provisions, Clauses, Covenants and Agreements usually inserted in Settlements of the like nature, and which shall be proper for effecting any of the purposes aforesaid.*" And *Arthur Clegg* covenanted, with Sir *R. Hill*, that he would, within six Months from the date of the Indenture, pay and discharge such Debts or Engagements then due and owing from Sir *R. Hill*, as Sir *R. Hill* should direct him to pay and discharge, to the extent of 100,000 *l.*, to the intent that all such Debts and Engagements might be fully paid and discharged in the manner and by the means aforesaid, so far as the Sum of 100,000 *l.* would extend thereto, and to the intent that all the said Manors and Hereditaments might be freed and discharged therefrom.

The Bill was filed, after the Marriage, praying that the Articles might be specifically performed.

By the Decree, it was referred to the *Master* to inquire in what manner, according to the true construction of the Articles, the Hereditaments and Premises comprised therein, ought, in the Settlement thereof thereby covenanted to be made, to be limited for the benefit of Sir *R. Hill* and the Issue of the Marriage. The *Master* reported that the Hereditaments and Premises ought to be limited to Sir *R. Hill*, for life, without Impeachment of Waste, with remainder to Trustees to preserve, &c., with remainder to the first and other Sons of the

Marriage in Tail Male, with remainder to the first and other Daughters of the Marriage in Tail Male, with remainder to the first and other Sons of the Marriage in Tail, with remainder to the first and other Daughters of the Marriage in Tail, with remainder to Sir *R. Hill* in Fee.

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By the Order on Further Directions, it was declared that the Estates ought to be limited in the manner reported by the *Master*; and it was referred back to him to settle Deeds of Settlement accordingly. In pursuance of this Order, a Draft of a Settlement was left in the *Master's* Office, containing the usual Powers of Sale and Exchange. The *Master*, in settling the Draft, struck out those Powers, conceiving that they were not authorised by the Articles; and he afterwards reported that he had settled the Draft, excluding such Powers: whereupon the Plaintiffs excepted to his Report.

Sir *E. Sugden*, Mr. *Coote*, and Mr. *Geldart*, in support of the Exceptions, said that the Articles were very inartificially drawn, for Estates for Life were given to unborn Children, with remainders to their Issue: that the *Master* had conceived that the word *and*, in the last Clause of the sentence relating to the Powers to be introduced into the Settlement, ought to be read as conjunctive, whereas it ought to be read as disjunctive.

Mr. *Knight* and Mr. *Tyrrell* for the Report:

In *Wheate v. Hall* (a), Sir *William Grant*, M. R. was of opinion that a Power of Sale and Exchange was not authorised by the Will. Undoubtedly, there was no express provision, in that Case, that such a Power

(a) 17 Ves. 80.

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should be inserted ; but there was a direction, giving every necessary authority to the Trustees.

Peake v. Penlington(b), is very shortly reported. It does not appear what else was contained in the Articles, besides the Clause relating to the Powers, nor what was the magnitude, nature, or description of the Estate comprised in the Articles. That Case, too, was not argued at any length, nor was the Case of *Wheate v. Hall* brought to the attention of Lord Eldon. Besides, in *Peake v. Penlington*, the approbation of the Trustees was required as to the Powers to be contained in the Settlement : and, in *Brewster v. Angell*(c), Lord Eldon, in his Judgment, alludes to that circumstance, and seems inclined to narrow the doctrine which he is reported to have laid down in *Peake v. Penlington*. His Lordship says : “ In *Peake v. Penlington* the direction was that the Settlement should contain a power for the Husband and Wife and the Survivor, to appoint new Trustees ; a Power to a Tenant for Life to appoint new Trustees, is, certainly, a usual Power ; and it then went on to say, ‘ and also all such other Powers and Provisions, &c. as are usually contained in Settlements of the like nature, as should be approved of by the Trustees or the Survivor, &c.’ Then it was said the meaning of that was that those Powers should be such as they or the Survivor should approve of ; and no doubt a Power of selling and exchanging by Trustees, with the consent of the Tenant for Life, is a usual and proper Power.” His Lordship, therefore, was of opinion that there ought to be some check on the exercise of the Power.

(b) 2 Ves. & Beam. 311.

(c) 1 Jac. & Walk. 625.

In *Horne v. Barton* (d), which is the same Case as *Brewster v. Angell*, Sir T. Plumer, M. R., says: "The Will contains no express authority for the insertion of a Power of Sale and Exchange. If such an authority be given, it is only by general words, &c." These two Cases show that general words, though found in a Will inartificially framed, will not authorise the insertion of a Power of Sale and Exchange.

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In *Pearse v. Baron* (e), the Articles stipulated that the Settlement should contain a Power of Leasing for 21 years in possession, a Power of Sale and Exchange, of appointing new Trustees, "and all such other Powers, Provisions, Clauses, Covenants and Agreements as are usually inserted in Settlements of the like nature." The Property was situate near *Waterloo Bridge*, and was extremely well adapted for building purposes; and the question was, whether a Power for granting Building Leases, for a longer term than 21 years, could be introduced. It was almost impossible to give effect to any Clause in the Settlement unless that Power was contained in it. But yet the *Master of the Rolls* was of opinion that the general words did not authorise the introduction of such a Power.

[The *Vice-Chancellor*:—In that Case a certain Power of Leasing was specified. If, in these Articles, it had been said that there should be inserted a Power to sell or exchange the Estates in the County of *Hereford*, and all other usual Powers, I should have held that the Power could not be extended to Estates in any other County; for then it would have been express-

(d) Jacob's Rep. 437.

(e) Ibid. 158.

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ed to what Estates the Parties intended that the Power should apply.]

If the Court once begins to insert Powers in Settlements, under general words like those in the present Case, where is it to stop? (*f*). It is extremely difficult to know what is the nature of a Power which the Court is to hold *usual*. In some Cases it might be proper to insert a Power of Sale and Exchange, and, in other Cases, it might not. In this Case, the Family is one of great antiquity; and the Mansion and Estates have belonged to the Family for many generations. Would it then be proper to introduce a Power extending over everything in the Settlement, under which, the Mansion and Estates might be alienated from the Family? It is not the practice of Conveyancers to insert, in every case, Powers of Sale and Exchange, extending over all the Property in the Settlement, unless they are specifically instructed so to do. In many Cases where such Powers have been introduced into Drafts, the Parties have ordered them to be struck out. In almost every instance, they are confined to certain portions of the Estates, or to certain Counties, or they are otherwise modified according to the particular circumstances of each case. In this Case it is most probable, if attention had been paid to this Power, that it would have been directed to be confined to the purchase of Estates in *Shropshire*. But, as the matter now stands, if the Power is introduced at all, it must extend to every County and over all the Property in the Settlement; for the Court has no guide to direct it

(*f*) The *Vice-Chancellor*, in the course of the argument, referred to *Williams v. Carter*, of which he said he had a manuscript note. That Case will be found in Sugd. Pow. Appendix, No. 5.

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where the line ought to be drawn. Again, are Powers to be inserted to lease Farms and Mines and to grant Building Leases, and upon what terms? Are there to be Powers for jointuring future Wives and charging the Estates with Portions for Children of future Marriages, and to what extent? The Court has nothing to guide it with respect to these particulars, any more than it has with respect to the restrictions and qualifications to which the Power of Sale and Exchange ought to be subjected. It appears, from what Lord *Eldon* says, in *Brewster v. Angell*, that some check ought to be imposed; and, certainly, no one would think of leaving the exercise of such a Power to the uncontrolled discretion of the Tenant for Life. If the Power to appoint new Trustees is given to the Tenant for Life, then the Power of changing the Estate is placed, substantially, in his hands. There is no settled form by which the discretion is to be controlled. In some Settlements, the Power is to be exercised by the Trustees with the consent of the Tenant for Life; in others, it is to be exercised by the Tenant for Life with the consent of the Trustees. In some cases the Power is made to extend over the whole of the settled Estates; in others, it is confined to a particular part of them, and to particular Counties. Amidst all these different forms, which is the Court to adopt as being usual?

The Articles direct certain purposes to be effected by the Settlement, namely, the raising of a Sum of Money by Mortgage, and the charging of the Estates with Portions for the younger Children of the Marriage; and then the Articles direct that there shall be inserted, in the Settlement, "all other Powers, Provisions, Clauses, Covenants and Agreements usually inserted in Settle-

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ments of the like nature, *and* which shall be proper for effecting *any of the purposes aforesaid.*" The observations which we have hitherto submitted to the Court, have been founded on the assumption that the word *and*, here, is to be construed disjunctively, and that the latter member of the sentence is to be considered as not controlling the former. But it must be remembered that this is the Case of a Deed, and not of a Will. Can the Court then change a word for the purpose of introducing a Power, which no one can be sure was in the contemplation of the Parties, and which might have the effect of entirely disappointing their intention? If the Argument in support of the Exceptions is to prevail, the latter member of the sentence will become mere surplusage: for Powers usually inserted in Settlements of the like nature, must be proper for effecting the purposes of those Settlements. On the other hand, the Construction which we contend for, makes every part of the sentence consistent, sensible, and useful.

We submit that the word *and*, is to be taken in its correct sense, and that the latter part of the sentence controls the general language of the former, and that no Power can be introduced into the Settlement, unless it is both usual and proper for effecting the purposes mentioned in the Articles.

The VICE-CHANCELLOR:

I do not think that there is much difficulty in this Case.

There is a palpable distinction between inserting in a Settlement, Powers for the management and better

enjoyment of the settled Estates which are beneficial to all Parties, and Powers which confer personal Privileges on particular Parties, such as Powers to Jointure, to raise Money for any particular purpose, &c. But Powers of Leasing, of Sale and Exchange, and, where there is any joint Property, or there are any Mines, or any Land fit for building purposes, Powers of Partition, of Leasing Mines, and of granting Building Leases, are Powers for the general management and better enjoyment of the Estates; and such Powers are beneficial to all Parties.

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It is not necessary, I think, that *and* should be read as *or*, in that Clause of the Articles which has been so much commented upon by the Counsel on both sides. It appears, on the face of these Articles, that the framer of them was grossly ignorant of the Law: for he has attempted to give Estates for Life to unborn Children, and Estates Tail to their Issue. And, when I find that he meant to do more than the Law would allow, I am not to suppose that, by the general words he has used, he meant to do less than the Law would admit of. My opinion, therefore, is that the Person who prepared these Articles, intended that any usual Power, Provision, Clause, Covenant or Agreement that would tend to the better enjoyment of the Estates, should be inserted in the Settlement, or, in other words, that the Clause in question should be taken as if it had stood thus: "And likewise all other Powers, Provisions, Clauses, Covenants and Agreements which shall be proper for effecting any of the purposes aforesaid, and which are usually inserted in Settlements of the like nature," which would include everything.

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Declare that the Articles of Agreement authorize an insertion, in the Settlement to be made in pursuance thereof, of a Power of Sale and Exchange of the Hereditaments and Premises comprised therein, and that such a Power ought to be inserted in the said Settlement: order that the Exception, taken by the Plaintiffs to the *Master's* Report, be allowed: and that it be referred to the *Master* to review his Report so far as he thereby approves of the Draft of the Settlement therein mentioned, without containing such Power of Sale and Exchange*.

* See *Lindow v. Fleetwood*, post p. 152.
12. Sim. 262. Same page - Good d.
1d. 426.

ABERDEEN v. WATKIN.

1833:
 29th May
 and 5th June.

Practice.

The Order for confirming absolutely a *Master's* Report as to a Purchase, when served, operates from the day on which it was pronounced.

THE Order for confirming the *Master's* Report *Nisi*, as to the purchase of Lot 2 of the Estates sold in this Cause, was served on the 19th of April 1833. On the 1st of May, *James Moor*, instructed his Solicitors to move to open the Biddings; and they then learned, from the Solicitors for the Parties to the Suit, that the Order *Nisi* had been served more than eight days previously. In consequence of which, they, on the same day, sent a Letter to the Purchaser, informing him that *Moor* intended to move, on the 7th of that month, to open the Biddings, and that, in case any further Proceedings were taken for the purpose of confirming the Report, he would move to set them aside. On the 2d of May, *Moor's* Solicitors learned, on inquiry at the Registrar's Office, that the Brief of the Motion for confirming the Report absolutely, had

been left there three days before, and the Order be-
spoken, but that the same had not been drawn up;
whereupon they immediately served the Purchaser, per-
sonally, with Notice of the intended Motion to open the
Biddings.

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Mr. *Jacob*, in support of the Motion, contended that
the Order for confirming the *Master's* Report abso-
lutely as to a Purchase, took effect from the time of
Service, and not from the time when it was pronounced.

Mr. *Knight* for the Purchaser,

Mr. *Collins* for a Party in the Cause.

The *Vice-Chancellor* said that his Opinion was against
the Motion, but that he would have the Practice in-
quired into.

On this day His *Honor* said that he had consulted
the Registrar (Mr. *Bedwell*), and also Mr. *Jackson*,
one of the Clerks in Court, and that they were both of
opinion that the Order for confirming the Report ab-
solutely, when it was drawn up and served, took effect
from the day on which it was pronounced; and he
refused the Motion with Costs*.

5th June.

* It did not appear, from the Brief, that the Order con-
firming the Report absolutely, had been served before the
motion to open the Biddings was made.

1833:
11th June.

WALTER v. MAKIN.

Will.

Construction.

*Legal
Representatives.*

Testator gave 450 l. to Trustees, their Executors, &c. in Trust for his Son for life, and after his Son's decease, to pay thereout two Legacies of 100 l. each to two of his Daughters, and to pay the Residue to the legal Representatives of his Son. And he gave the Residue of his Personal Estate to his Son, his Executors, &c. Held that the words *Legal Representatives* meant Next of Kin.

JOHN HOMFRAY made his Will, dated the 17th of January 1804, as follows: "I give and bequeath unto *Isabella Thornley* the Sum of 10 l., also to *Benjamin Parker* the Sum of 20 l. and all my working Tools, and I give to my Sister, *Ann Homfray*, the Sum of 10 l., and I give to my two Friends, *Joseph Osborne* and *Matthew Howe*, my Trustees hereinafter named, the Sum of Ten Guineas each. I give and bequeath, unto my said two Friends *Joseph Osborne* and *Matthew Howe*, the Sum of 450 l., to be paid to them within two months next after my death, upon Trust that they the said *Joseph Osborne* and *Matthew Howe*, or the Survivor of them, or the Executors or Administrators of such Survivor, shall and do, as soon as conveniently may be, put and place out or invest the said Sum of 450 l. upon Real Security, or in the Public Stocks or Funds, and pay the Interest or Dividends arising therefrom, from time to time, as the same shall become due and payable, unto my said Sister, *Ann Homfray*, or her Assigns, during her life; and upon further Trust, from and immediately after the decease of my said Sister, to call in the said Sum of 450 l. so to be placed out as aforesaid, and, thereout, to pay the Sum of 20 l. to the said *Benjamin Parker*, and the Sum of 10 l., to *Isabella Thornley*, and, from and after payment of the said two Legacies last mentioned, upon further Trust that they the said *Joseph Osborne* and *Matthew Howe*, or the Survivor of them, or the Executors or Administrators of such Survivor, shall and do, as soon as conveniently

*Hindcliffe v
Wetherill & Co
2 Dec 5 x L. 216
Walker v A. J. G. (M. D. 16. L. 329
King v Cleveland
4 Leg. & J. 423.*

Stockdale & Ingham 4 L. Rep. 29. 367

may be, put and place out, or invest the residue of the said 450*l.*, upon Real Security, or in the Public Stocks or Funds, and pay the Interest or Dividends arising therefrom, from time to time, as the same shall become due and payable, unto my Son, *John Homfray*, or his Assigns, during his life, and upon further Trust, from and immediately after the decease of the said *John Homfray*, to call in the residue of the said 450*l.* so to be placed out as aforesaid, and to pay, thereout, the Sum of 100*l.* to *Sarah Ann Homfray*, one of the Daughters of my said Son, *John Homfray*, and the further Sum of 100*l.*, to *Juliana Homfray*, the other Daughter of my said Son, *John Homfray*; and upon further Trust to pay the residue of the said Sum of 450*l.* then remaining, unto the legal Representatives of my said Son, *John Homfray*."

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The Will then provided for the Indemnity and Reimbursement of the Trustees, and concluded in the following words :

"And as for and concerning all my Real Estate whatsoever and wheresoever, and also all my Mortgages, and all my Estate, Right, Title and Interest in the Messuages, Lands, Tenements and Hereditaments comprised in such Mortgages, and all my Money, Securities for Money and other my Personal Estate and Effects, of what nature or kind soever and wheresoever, I give, devise and bequeath the same, (subject to and charged with the payment of all my just Debts, Funeral and Testamentary Expenses, and, also, with the payment of the several Legacies hereinbefore by me given and bequeathed,) unto my said Son, *John Homfray*, his Heirs, Executors, Administrators and Assigns,

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absolutely, to and for his and their own use and benefit."

Osborne, after the Testator's death, invested the 450*l.* in the purchase of 797*l.* Three per Cent. Reduced Annuities in his own name.

By an Indenture of the 20th of February 1808, *John Homfray*, the Son, assigned the 797*l.* Stock to *Robert Cory*, subject to the Life Interest of *Ann Homfray*, and to the Legacies payable thereout. After the death of *Ann Homfray*, the Bill was filed by Persons claiming under *Robert Cory*, against *John Homfray* and his Wife and Children and certain other Parties, praying that it might be declared that the Plaintiffs were entitled to the Stock subject to the Legacies of 100*l.* and 100*l.*

Mr. *Knight* and Mr. *G. Richards*, for the Plaintiffs, contended that, under the Will, *John Homfray*, the Son, became absolutely entitled to the Fund, subject to the Life-interest of *Ann Homfray*, and to the payment of the Legacies with which it was charged: that the words "Legal Representatives," *prima facie*, meant "Executors and Administrators," though they might be held to mean Next of Kin, where the context of the Will required it: but, in the present Case, there was nothing to show that the words "Legal Representatives" were not to be taken in their proper and ordinary sense: *Bulmer v. Jay* (a); *Saberton v. Sheels* (b); *Price v. Strange* (c): that the Life-interest given to *J. Homfray*

(a) *Ante*, vol. IV. p. 48.

(b) 1 Russ. & Myl. 587.

(c) Madd. & Geld. 159.

was separated from the Reversion, in order to admit the provision for his two Daughters after his death: that the Testator, having so provided for two of his Son's presumptive Next of Kin, could not mean the words "Legal Representatives," to be taken in the sense of Next of Kin.

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Mr. *Pepys*, Mr. *Barber*, Mr. *Cooke* and Mr. *S. T. Preston*, appeared for the Defendants:

But the VICE-CHANCELLOR, without hearing them said:

I cannot put the construction, which the Plaintiffs have contended for, on the words "Legal Representatives." For it is clear, on the face of the Will, that the Testator meant to use those words in a different sense from "Executors and Administrators," which latter words occur, several times, in the Will, and, especially, in the Gift of the residue to the Son: and, moreover, the effect of putting that construction on the words, would be to make the Son partial Residuary Legatee so far as the 450 *l.* is concerned, and also general Residuary Legatee of the Personal Estate.

Declare that the words "Legal Representatives" mean Next of Kin*.

* See *Robinson v. Smith*, ante, p. 47, and *Styth v. Mouro*, ante, p. 49.

1835:
31st March.

LINDOW v. FLEETWOOD.

Rolls.

Will.

Construction.

Power to appoint
new Trustees.

Testator directed his Real Estates to be settled on certain Persons in strict settlement, and that there should be inserted, in the Settlement so to be made, Powers of Leasing, Sale, Partition, and Exchange. "And my Will is that, in such intended Settlement, shall be inserted all such other proper and reasonable Powers as are usually inserted in Settlements of the like nature." Held that a Power to appoint new Trustees, was a proper and reasonable Power to be inserted in the Settlement.

12. Jan. 426.

WILLIAM LINDOW, Esquire, by his Will, after charging his Real and Personal Estates with the payment of his Debts and Funeral Expenses, devised, to Trustees and their Heirs, all his Messuages, Lands, Tenements, Hereditaments and Real Estates in *England*, and also his Parts and Shares of and in certain Estates or Plantations in the Islands of *Grenada* and *St. Vincent's* in the *West Indies*, upon Trust, within 12 calendar months after his decease, to settle certain parts thereof, in the most effectual manner taking the advice of Counsel thereon, so as that an Annuity of 50*l.* might be charged upon a competent part thereof, and be paid to his Sister *Ellinor*, the Wife of Mr. *James Jackson*, for her separate use, and, subject as aforesaid, the Testator declared that the same Hereditaments and Real Estates should be settled, limited and assured to the use of his Children and Child by his Wife *Abigail*, as she should by Deed or Will appoint, and, in default thereof and subject thereto, to the use of all and every his said Children as Tenants in Common in Tail, with Cross Remainders between them in Tail, and, for default of such Issue, to the use of the Trustees and their Heirs, during the life of his Wife *Abigail*, in Trust to pay the Rents to her, during her life, for her separate use, and, after her decease, to the use of any one of the Sons of *Henry Rawlinson*, the Brother of his Wife, and his Issue in Tail Male, and, for want of such Issue, to any one of the Daughters of *Henry Rawlinson*, and her Issue in Tail Male, with remainders over to any others of the Children of *Henry Rawlinson*,

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one after another, and their Issue in Tail Male, as the Testator's Wife, by Deed or Will, should appoint; and, in default thereof, to the use of the Trustees and their Heirs, during the life of the Plaintiff *Henry Lindow Lindow*, then *Henry Lindow Rawlinson*, Son of *Henry Rawlinson*, in Trust to pay the Rents thereof to the Plaintiff, for his life, and, after his decease, to the use of his first and other Sons successively in Tail Male, with remainder to his Daughters as Tenants in Common in Tail, with Cross Remainders amongst them in Tail, with divers remainders over, and the ultimate remainder to the use of the Testator's right Heirs. The Testator directed other parts of his Estates to be settled on his Nieces and their Children, in strict settlement; and, in a subsequent part of the Will, the following Clause was contained:

"And my will and mind is, and I do hereby direct that, in the said several Settlements to be made as aforesaid, there shall be respectively inserted proper Powers to enable the several Tenants for Life therein to be named, when respectively in possession, and also the Trustees to uses to be named in such Settlements, during the Minority of any Person or Persons who, by virtue of the Limitations therein to be contained, shall be entitled to any Estate of Freehold or Inheritance of or in any of the Estates to be comprised in such Settlement or Settlements, and also the Trustees for my said Wife and her Nephews, to make Leases for years of the said Estates to be comprised in such Settlements, or any part or parts thereof, not exceeding 21 years in possession, reserving, from time to time, the greatest annual Rent that may be reasonably had for the same, without taking any Fine, or anything in the nature

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of a Fine or Premium for the making any such Lease or Leases, and also a Power for the Trustees to uses in such Settlements to be respectively named, with the consent of the Tenant for Life in Possession, or the Person entitled to the Rents and Profits for his or her life, to make Sale or Partition of, or to exchange any of the Messuages, Lands, Tenements or Hereditaments which shall be comprised in such Settlements, for other Messuages, Lands or Hereditaments of equal value: and my will is that, in such intended Settlements, shall be inserted *all such other proper and reasonable Powers as are usually inserted in Settlements of the like nature.*"

The question was whether the concluding words of the above Clause, authorized the insertion of a Power to appoint new Trustees, in the Settlements to be made in pursuance of the Will.

Mr. *Spence* and Mr. *Walker* for the Plaintiffs.

Mr. *Simons* and Mr. *L. Lowndes* for the Defendants.

The *Master of the Rolls* said that, taking the Clause relating to the Powers to be inserted in the Settlements to be as the Bill stated it*, he doubted whether the general words would authorize the insertion of the Power in question, or of any other Power that was not

* The Clause was thus stated in the Bill: "And the said Testator, after directing certain Powers of granting Leases of his said Estates, and also of Sale, Partition, and Exchange of the same, to be inserted in the said intended Settlements, directed that there should also be inserted therein, all such other proper and reasonable Powers as are usually inserted in Settlements of the like nature."

of the same nature as those specifically mentioned. But His *Honor* added that he had referred to the Will, and, as he found that those general words were contained in a separate and distinct sentence, he was of opinion that they would authorize the insertion of a Power to appoint new Trustees in the Settlements to be made in pursuance of the Will*.

* See *Hill v. Hill*, ante, p. 136.

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BLANCHARD v. CAWTHORNE.

GEORGE NOBLE, having been appointed the Receiver, in pursuance of the Order made on the Motion in this Cause, (reported *ante*, Vol. IV. p. 566,) with liberty to manage, set and let the Grants, Deputations and Demises, with the approbation of the *Master*, he, in June 1832, advertised the exclusive right of Sporting over the Forest of *Wyersdale* to be let, and that the Terms might be known on application to him, the Receiver of the Rents of the Forest appointed by the Court of Chancery.

1833:
31st January,
23d May &
12th June.

Injunction.

A Receiver having been appointed, in a Creditor's Suit, of the office of Master Forester of a Royal Forest, an Injunction was afterwards granted to restrain certain Persons who owned Lands in the Forest, from Sporting in it.

On the 5th of August 1832, *J. Bradshaw Hathornthwaite*, an Owner of Lands in the Forest part of the Vaccary of *Leigh*, offered to give the Receiver 180 *l.* for the right of Sporting in the Forest for the Season, but, afterwards, he retracted his offer, and the Receiver, but without the sanction of the *Master*, let to other Persons, the exclusive right of Sporting over the Forest.

In October 1832, *J. Bradshaw Hathornthwaite* having been found Sporting in the Forest, one of the Lessees

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served him with a Notice, signed by the Receiver, stating that the right of Sporting over the Forest had been let for the Season, and that if any Person should be found Sporting in it, without the Receiver's authority, application would be made, to the Court of Chancery, for his Committal to the *Fleet*, for a Contempt. *Hathornthwaite* disregarded the Notice, and repeatedly afterwards Sported in the Forest: whereupon the Plaintiffs served him with a Notice of a Motion for his Commitment to the *Fleet*, and for an Injunction to restrain him from Sporting in the Forest. The Motion was supported by an Affidavit made by the Receiver and other Persons, stating the facts before mentioned, and verifying the Grants made to *Cawthorne*, and the Deputations which had been made by him from time to time, and stating that he had always exercised, and enforced when necessary, the exclusive right of Sporting in the Forest.

Mr. *Knight* and Mr. *James Russell*, appeared in support of the Motion; but no Counsel appeared for *J. B. Hathornthwaite*.

The *Vice-Chancellor* ordered that he, having personal notice of the Order, should, on the 21st of February, show Cause why he should not be committed to the *Fleet* for Sporting, pursuing and killing Game in the Forest, Chase, Manor or Lordship of *Wyersdale*, with full Notice and in violation of the Order for the appointment of the Receiver; and that he should be restrained from Sporting in the Forest, Chase, Manor or Lordship, or pursuing, or killing, or attempting to kill any species of Game within the Limits thereof, or from doing any act to disturb or impede the Receiver or his Agents, or any Person acting under his License or Authority, or

to whom he might make Grants, Deputations, or Leases, in the full possession and exercise, so far as related to the said Forest, Chase, Manor or Lordship, or the Lands therein included, of any of the Rights and Privileges granted by the Letters Patent.

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On the 21st of February 1833, the Order for the Committal of *Hathornthwaite*, was made Absolute, on an Affidavit that the same had been served upon him personally.

On this day a Motion for an Injunction, similar to 23d May. that which had been obtained against *J. B. Hathornthwaite*, was made, by the Plaintiffs, against *John Walmsley*, and his son, *John Walmsley Hathornthwaite*, who was the Owner of the remainder of the Vaccary of *Leigh*.

Several Affidavits were filed in opposition to this Motion, stating that the Rights and Powers claimed by *Cawthorne*, had been subject to disputes for upwards of 20 years: that the Owners of Lands in the Forest, and others with their permission, had, for several years, Sported over their Lands in the Forest, and had refused to permit *Cawthorne* and his Friends to Sport over the same: that *Cawthorne* commenced an Action against one of the Deponents, for having killed Game in the Forest, but did not proceed with it, and the same was *non prossed* by the Deponent, who afterwards continued to Sport in the Forest, without any interruption from *Cawthorne*: that *Wyersdale* was not a Forest in law, nor were those Forestal Rights belonging to it which were claimed on behalf of the Patentee of the Duchy of *Lancaster*: That, by 16 Charles I. c. 16, s. 5, it was enacted that no Place or Places within the Realm

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of *England* or dominion of *Wales*, where no Justice-seat, Swainmote or Court of Attachment had been held or kept, or where no Verderers had been chosen, or regard made within the space of 60 years next before the first year of his then Majesty's reign, should be, at any time thereafter, judged, deemed or taken to be Forest, or within the bounds or metes of the Forests, but the same should be, from thenceforth, disafforested and freed and exempted from the Forest Laws, any Justice-seat, Swainmote or Court of Attachment held or kept within or for any such Place or Places, at any time or times since the beginning of his said Majesty's reign, or any presentment or inquiry, act or thing theretofore made, or thereafter to be made or done to the contrary, notwithstanding. The Affidavits further stated that, as Deponents believed, neither a Justice-seat had been held or kept, nor had Verderers been chosen, or regard made within the period or the terms specified in the said Act of Parliament: That *Richard Hathornthwaite* (the former Owner of the Lands belonging to *J. B. Hathornthwaite* and *John Walmsley Hathornthwaite*) kept Harriers, and hunted over his Estates and other parts of the Forest, and was never interrupted in so doing by *Cawthorne*, except that, in the year 1786, *Cawthorne's* Gamekeeper, by his instructions, shot several of *Richard Hathornthwaite's* Dogs, upon which he brought an Action and recovered a Verdict against the Gamekeeper, and, afterwards, continued to kill Game in *Wyersdale*, without interruption.

The Affidavits in reply stated that, in 1812, *Mr. Lawson*, the then Proprietor of one of the other Vaccaries in the Forest, claimed the right of Free Warren over that Vaccary, under Letters Patent granted by King James I.; and that an action of Trespass for

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entering that Vaccary and killing and carrying away Game therein, was commenced, in the name of the Tenant, against *Cawthorne's* then Gamekeeper: that the Defendant pleaded, in justification, the Letters Patent granted to *Cawthorne*, and that he was deputed and constituted *Cawthorne's* Deputy Gamekeeper; that the Plaintiff, by his Replication, pleaded the Letters Patent of James I., and claimed, thereunder, the right of Free Warren: that, in 1813, the question was argued before the Judges of the King's Bench, who were unanimously of opinion that the right of Free Warren did not pass by the Letters Patent of James I., and ordered the Verdict to be entered for the Defendant: that *Richard Hathornthwaite* succeeded in his Action, by reason of the Gamekeeper not being able to prove his Deputation: that the Forester for the time being of *Wyersdale*, or his Steward, had, from time to time, held Courts in the Forest intituled: "Forest of *Wyersdale* in the County of *Lancaster* (to wit), the Forest Court, Court Leet and View of Frankpledge, with the Court Baron and Swainmote of our Sovereign Lord the King."

Mr. *Knight* and Mr. *James Russell*, in support of the Motion.

Mr. *Agar* and Mr. *Duckworth*, for *John Walmsley* and *John Walmsley Hathornthwaite*.

The Vice-Chancellor granted an Injunction in the terms of the Notice of Motion, and ordered the Parties to proceed to a Trial at Law, at the then next Summer Assizes for the County of *Lancaster*, on the following Issues: First, whether a certain Place or District called *Wyersdale*, in the County of *Lancaster*, or any part thereof, was or was not a Forest belonging to His Majesty,

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in right of his Duchy of *Lancaster* : Second, whether a certain Place or District called *Wyersdale, &c.* was or was not a Chase belonging to His Majesty, in right of his Duchy of *Lancaster* ; and the Plaintiffs in the Cause, were to be Plaintiffs at Law, and *J. Walmsley* and *J. Walmsley Hathornthwaite* were to be Defendants at Law : Third, whether *J. Walmsley* and *J. W. Hathornthwaite*, or either of them, were or was entitled to Free Warren in the Vaccary of *Leigh* or any part thereof : Fourth, whether they, or either of them, were or was entitled to kill Game in that Vaccary or any part thereof : and *J. Walmsley* and *J. W. Hathornthwaite* were to be Plaintiffs at Law, and the Defendants in the Cause were to be Defendants at Law : and, in case any special matter should arise on the Trial of any of the Issues, it was to be indorsed on the *postea* *.

22d May.

On this day, a Motion was made on behalf of *J. Bradshaw Hathornthwaite*, to discharge the Orders made against him.

Mr. *Agar* and Mr. *Duckworth*, in support of the Motion, read the Affidavits made in opposition to the preceding Motion.

Mr. *Knight* and Mr. *James Russell* opposed the Motion.

12th June.

The *Vice-Chancellor* directed Issues to be tried similar to those in the preceding Order, and suspended the execution of the Order of Committal in the meantime †.

* A Motion to discharge the above Order was refused by Lord *Brougham, C.*, on the 3d August 1833.

† None of the Issues were tried.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

HOWARTH AND OTHERS v. SMITH.*

1833:
8th February.

*Vendor and
Purchaser.
Title.*

THIS was a Suit by Vendors to compel specific performance of a Contract for purchase of a Freehold Estate, devised by the late Owner, *John Swinglehurst*, by a Will, dated 13th February 1811, but which the Defendant alleged was not the Will referred to by a subsequent Codicil of the Testator, and therefore was not his last Will.

Testator by his Will, in his own hand-writing, devised an Estate to *Ann Aspinall* and her Heirs, if she should be then living; but, if not, then to her Issue and their Heirs. He afterwards made a Codicil commencing thus :

By the Will of 1811, the Testator gave all his Real and Personal Estates, subject to the payment of his Debts and Funeral and Testamentary Expenses, unto and to the use of the Plaintiff, *Richard Howarth*, and

“This is a Codicil to the last Will and Testament of me, *J. S.*, and which Will I sometime since made in my own hand-writing, and thereby devised to *John Aspinall* as therein mentioned.” At the date of the Codicil, *Ann Aspinall* had a Son named *John*. Part of the Testator’s Estates having been sold in pursuance of a direction in the Will, the Purchaser objected to the Title on the ground that the reference in the Codicil afforded strong presumption of the existence of a subsequent Will. But, as the Will contained a Gift which might take effect in favour of *John Aspinall*, the objection was over-ruled.

* *Ex Relatione Mr. Greening.*

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Shackleton Midgley, and the Survivor of them and his Heirs, upon and for the Trusts and Purposes after-mentioned (that is to say) upon Trust that the Trustees and the Survivor of them should pay an Annuity of 60 l. to the Testator's Sister, *Elizabeth Hoyle*, for her life, and, after her death, to her Children and their Issue, and, unto *Isabella* the Daughter of *Benjamin Spencer*, an Annuity of 60 l. while she should continue unmarried; and, unto *Mary Swinglehurst*, the Daughter of the same *Isabella* and also the Testator's Daughter, during her life, an Annuity of 60 l.: and the Testator willed that the same *Isabella* and *Mary* should have the use of the House, Lands, Stock and Household Effects in his own possession and occupation at the time of his death, during their lives and the life of the longer liver of them, but, if *Isabella* should marry, that she should lose her right therein, and that the Income of the rest, during his Daughter's Minority, should be applied in discharge of the other of his Debts, Legacies and other Payments, at the discretion of his *Executors*: and all the Residue of the Testator's said Estates and Effects (subject to all the same Payments and also to the Legacies thereafter mentioned) unto his same Daughter *Mary*, during her life, and, afterwards, to her Issue living at her death, in manner in the Will mentioned, and for want of such Issue, to the Testator's said Sister *Hoyle*, for her life, and, upon her death, to her Issue who should be then living, and, for want of such Issue, the Testator willed that all his Property should be given, and he gave the same to *Ann otherwise Nanny Aspinall*, his Cousin, the Wife of *Henry Aspinall, Esq.* if she should be then living, and to her Heirs and Assigns for ever: if she should be then dead, the Testator gave, devised and bequeathed the same to her Issue

or Issues, in the same manner as to Mrs. Hoyle's Issues, and to their respective Heirs for ever. And, after bequeathing some Legacies and Annuities, the Testator willed that it should be lawful for *his said Trustees and Executors thereafter named*, at any time during the Minority of his Daughter, if necessary, to mortgage some sufficient part of his said Lands, Tenements, Hereditaments, and Premises, and, after her attaining the age of 21 years and deliberately considering what part or parts thereof, and the *said Trustees* believing it expedient so to do, to sell the same part or parts so fixed on, and their Receipts to be sufficient Discharges for the Purchase-money, in order to raise Money to pay his Debts and the Annuities and Legacies given by his Will. And the Testator appointed *Howarth and Midgley, his Trustees for the uses of his Will*, and appointed his said Daughter and *Howarth* Executrix and Executor thereof.

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Midgley, one of the Trustees appointed by the Will, died soon after its date.

On the 11th March 1827, *John Swinglehurst* made a Codicil to his Will in the form following: "This is a Codicil to the last Will and Testament of me, *J. Swinglehurst*, of, &c. and which Will I sometime since made in my own hand-writing, and thereby gave, devised, and bequeathed to *John Aspinall and his Heirs as therein mentioned*, which Gift and Devise I do hereby make null and void, as if the same had not been inserted and contained therein, and I do hereby direct that the Person and Persons who shall then be entitled, shall stand seised of the same subject to the same Limitations and Directions as the said *John Aspinall* and his Heirs stood seised of them. I do, hereby, give

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and bequeath, unto *J. H. Spencer*, who now resides with me, an Annuity of 10*l.* during the term of his natural life, and I do hereby charge my Real and Personal Estates with the payment of the same. I do hereby ratify and confirm my said Will in every particular thereof that is not hereby altered or revoked."

The Will of 1811 was in the hand-writing of the Testator; the Codicil was in another hand.

Isabella Spencer died in the Testator's lifetime, and his Daughter became of age and married *Christopher Grimshaw* in the Testator's lifetime; but whether those events happened before the date of the Codicil, did not appear. The Testator died in August 1830.

Ann Aspinall survived the Testator, and, at the time of his death, was a Widow and had two Children, namely, *John Aspinall* and *Elizabeth Greenwood*, both of whom were adult.

The Testator's general Personal Estate being insufficient to pay his Debts, &c., *Howarth*, the surviving Trustee of the Will, with the consent of Mrs. *Grimshaw*, agreed to sell part of the Testator's Real Estates to the Defendant *Smith*.

The Purchaser objected to the Title on two grounds: First, that the Codicil referred to a disposition not contained in the Will of 1811, and, therefore, showed that the Testator had made another Will, or, at all events, raised so strong a presumption that another Will existed as to render the Title under the Will of 1811 doubtful and unmarketable. Second, that the power of Sale

given by the Will to the Trustees, did not survive to *Howarth*.

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In a Suit of *Grimshaw v. Howarth and others*, subsequently instituted, in Chancery, for the Administration of the Testator's Assets, the Will and Codicil were declared to be well proved; and the Master having reported, upon a reference made to him in that Suit, that it would be for the benefit of the Parties interested in the Testator's Estates that a Suit should be instituted to compel the Defendant *Smith* to complete his Contract, the present Suit was instituted for that purpose.

Sir *Edward Sugden* and Mr. *Barber* for the Plaintiffs, said it was clear that the Codicil referred to the Will of 1811; for though that Instrument contained no Devise to *John Aspinall*, by name, yet it contained a limitation to the Issue of *Ann Aspinall*, under which he would be entitled to take: that the Will of 1811 had been established; and, though the Testator had been dead for three years, it had never been pretended that any other Will existed. *Sperling v. Trevor* (a). As to the second objection they relied on an unreported Case, *Hall v. Davis*, decided by Lord *Eldon* in 1827, as conclusive.

Mr. *Preston* and Mr. *Greening* for the Defendant, said that the Case must be determined by an application of the rules of Equity with regard to doubtful Titles. That a Purchaser shall not be compelled to accept a doubtful Title, is an admitted rule, and is established on incontrovertible reasons, and yet it is

(a) 7 Ves. 497.

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one which has never been analysed or explained, *Price v. Strange* (b); and, therefore, its application has been uncertain, and the rule itself has been objected to, even by high authority. In truth, the term "doubtful Title" has been improperly confined in the Books; for it has not always been applied to Cases turning upon doubts which it was competent to the Courts to remove. From consideration of principle, and from a review of the Cases, it is manifest that doubtful Titles are of three kinds; the first being where the doubt is respecting the existence of an alleged rule of Law or Equity; the second being where the doubt is only respecting the application, in the particular instance, of a general rule, the existence of which is admitted, and of this kind are obviously all Cases of Construction; and the third being where the doubt is respecting a fact. In Cases of the first class, it is in the power of the Court (for the Law speaks by the Judge) to remove the doubt, and hence it has often happened that, when a Case of this kind has been reported, the doubt having been removed, the Case has not been referred to as one of doubtful Title. In Cases of this class, the Court has generally and rightly compelled Purchasers to accept Titles originally doubtful; as in *Moody v. Walters* (c); *Biscoe v. Perkins* (d); *Pearson v. Lane* (e); *Smith v. Death* (f); *Hasker v. Sutton* (g); *Adams v. Taunton* (h); *Howard v. Duncane* (i). But there are Cases even of this first class, in which a Purchaser has not been compelled to take the title; as *Blosse v. Clanmorris* (k); and *Playford v.*

(b) Madd. & Geld. 159.

(c) 16 Ves. 283.

(d) 1 Ves. & Bea. 485.

(e) 17 Ves. 101.

(f) 5 Madd. 371.

(g) 2 Sim. & Stu. 513.

(h) 5 Madd. 435.

(i) 1 Turn. & Russ. 81.

(k) 3 Bli. 62.

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Hoare (l). Decisions which it is difficult to account for otherwise than by a supposition that the Cases of the first and second classes were not distinguished. Lord *Eldon* took a part in the former Decision, and it would, perhaps, be too much to say that the rule was not understood by him; but, that he was under a misconception with regard to its origin at least, is apparent from his observations in *Jervoise v. The Duke of Northumberland* (m), contrasted with those of Sir Wm. Grant in *Sloper v. Fish* (n). In Cases of the first kind it is perfectly immaterial between what Parties the question arises, because the Law is determined without reference to any one Case more than another. Not so however in Cases of the second or third classes; for, in these, it would be contradictory to the universal principles of Justice and to the rules of Courts of Equity, to pronounce final Decisions upon the points in doubt; since, if this were done, the rights of absent Parties would be bound or destroyed, without their having any opportunity to defend them: but it is obvious that, without such final Decisions, no Security could be given to the Purchasers, who would be left exposed to litigation with all Persons not Parties to the original Suit. The consequence is that, in all Cases of this kind, a Purchaser ought to be, and is relieved from the acceptance of the Title upon which the doubt exists. As Cases of the second kind may be cited *Marlow v. Smith* (o); *Shapland v. Smith* (p); *Cooper v. Denne* (q); *Sheffield v. Lord Mulgrave* (r); *Roake v. Kidd* (s); *Wheate v.*

(l) 3 You. & Jerv. 175.

(p) 1 Bro. C. C. 75.

(m) 1 Jac. & Walk. see p.

(q) 1 Ves. J. 565.

568-9.

(r) 2 Ves. J. 526.

(n) 2 Ves. & Bea. 149.

(s) 5 Ves. 647.

(o) 2 P. Wms. 198.

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Hall (t); *Sloper v. Fish* (u); *Price v. Strange* (x); *Willcox v. Bellaers* (y); *Sharp v. Adcock* (z); and we may refer to the observation of C. B. *Alexander* in *Colmore v. Tyndall* (a). Perhaps, however, *Sloper v. Fish* may be considered rather as an exception to the general rule of decision in Cases of the first kind; for, although upon the facts, and upon the particular doubts stated by Sir *Wm. Grant* in the commencement of his Judgment, the determination must have been the same, yet he seems to have rested his Judgment upon more general grounds. And it may be doubted whether *Price v. Strange* also ought not to be referred to as a Case of the first description; although the only result of this would be to determine, that, where even a general question of Law is exposed to so much doubt that it is obviously impossible to set it at rest by a single decision, there, as between Vendor and Purchaser, a question of the first class is treated in the same manner as one of the second or third class.*

(t) 17 Ves. 80.

(y) 1 Turn. & Russ. 491.

(u) 2 Ves. & Bea. 145.

(z) 4 Russ. 374.

(x) 6 Madd. & Geld. 159.

(a) 2 You. & Jerv. 617.

* The Reporter is indebted to Mr. *Greening* for the following Note:

There are two Cases which might have been adverted to as opposed to the current of these Decisions; *Jenkins and others v. Herries*, 4 Madd. 67, and *Rushton v. Craven*, 12 Price, 599.

In the former Case, for the words "Decree a Specific Performance," (4 Madd. 82) should be read "Overrule the Exception."

The Defendant afterwards appealed to the House of Lords against the Order. The Appeal was heard 10 Feb. 1823. Lord *Eldon* said that, as the Judgment of the House on that Appeal, could not bind any Issue which *Thomas Jenkins*

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In Cases of the third class there are additional reasons for the course which has been adopted by the Courts; since, in these Cases, it is scarcely possible to pronounce a final Judgment between any Parties; for the facts which appear may be rendered nugatory by the disclosure of others. Hence, in every Case of this kind, the Purchaser has been discharged from his Contract. *Loves v. Lush* (b); *Franklin v. Lord Brownlow* (c); *Stapylton v. Scott* (d); *Hartley v. Smith* (e); *Cann v. Cann* (f); see also the observations of Lord Eldon, in *Lord Braybrooke v. Inskip* (g). The present Case does not arise out of any question respecting the existence of a general rule of Law or Equity, nor upon any question as to the application of an admitted rule; but it depends, simply, upon a question of Fact, namely,

might thereafter have, but such Issue might, at a future period, contest the question with the Purchaser, he considered that, before the House should be called to give its final Judgment, the Court of Chancery should decide, by a Decree, whether the Title was so clearly good and marketable as to be binding against an unwilling Purchaser; and, if the Court should decide in the Affirmative, and decree a Specific Performance, then the House of Lords must give its final Judgment on the subject; but if in the Negative, it might be unnecessary for the House to decide the question.

An Order was made, on the 14th Feb. 1823, directing the Appeal to stand over until the Cause had been heard on Further Directions in the Court below, with liberty to the Parties then to apply to the House as they might think fit. And, in *Rushton v. Craven* the declaration that the Purchaser was bound by the opinion of the Court, avoids altogether the real difficulty. See Sir John Leach's concluding Observations in *Sharp v. Adcock*. This Suit was an amicable one, and the Case subsequently granted was with the Purchaser's consent.

(b) 14 Ves. 547.

(c) Ibid. 550.

(d) 16 Ves. 272.

(e) Buck. 368.

(f) 1 Sim & Stu. 284.

(g) 8 Ves. see p. 428. et seq.

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whether *John Swinglehurst* did or did not make another Will than that of 1811? This Codicil raises at least a presumption that he did; and, that he did not, is no more capable of proof than was in *Lowes v. Lush*, the fact that there was no Debt to support a Commission of Bankruptcy. This Case, therefore, is clearly one of the third class, and the Plaintiff's Bill must be dismissed. *Sperling v. Trevor*, cited for the Plaintiffs, has no application; for, in that case, there was nothing to create a doubt, and it was decided upon the ground that no doubt existed; and, had the Decision been otherwise, every Title to an Estate in Remainder must have been held doubtful.

The second Objection was not urged by the Defendant's Counsel.

THE VICE-CHANCELLOR:

It is admitted that, at the time when the Testator made his Codicil, *Ann Aspinall* had a Son named *John*. Now the Will contains a Devise to *Ann Aspinall*, (if she should be then living) and her Heirs; and if she should be then dead, to her Issue and their Heirs: and, consequently, the Will contains a Gift that may take effect in favour of *John Aspinall*: and, that being so, I am of opinion that the Codicil does refer to the Will that has been produced. If the Codicil had referred to a Person who did not take under the Will, that might have been a good ground of objection; but, as I find, in the Codicil, a reference to the Will, it is not sufficient to say that there may be another Will.

Declare that there is no objection to the Title in respect of the reference in the Codicil to the Will that has been produced.

PRESTWIDGE v. GROOMBRIDGE.

1833 :
7th May.

*Will
Construction.*

MATILDA FRANCES PRESTWIDGE, made her Will, dated the 25th of November 1814, as follows :
 " Having, by the blessing of God upon my humble endeavour, discharged my Debts that I had contracted over and above my Bond Debts, and having also paid off some Instalments upon these, thereby realizing Property that I feel a right to dispose of, I am encouraged to draw up this my last Will and Testament, trusting that my wishes will be binding upon my Executors, though not expressed agreeably to forms of Law. After a few Legacies (to be named hereafter), I request that my Effects may be sold, and the Sum arising from thence be funded ; the Interest thereof to be paid to my Father, quarterly, during his life : at his death I should wish it to be applied as follows : the Interest to defray the Expenses of my Nephews *George* and *Charles Prestwidge's* Education : that end answered, the Principal to be employed to set them out in the world, either to bind them Apprentices at the ages of 14, or to be reserved till they attain to 21 years to commence Business, as it shall be deemed most advantageous by my Executors, whose judgment will be guided by the bent of the Boys' dispositions, and the situation of their Father at the time when they shall be called upon to decide. *In the event of the elder Boys, Geo. and Charles Henry*) have the Benefit, and so on." *George*, and *Charles* survived the Testatrix, but died under 21 ; held that *James* and *Henry* were entitled to the Residue.

Testatrix directed the Interest of her Residuary Estate to be applied in defraying the Expenses of the Education of her Nephews *George* and *Charles*, and the Principal to be applied either in binding them Apprentices at the age of 14, or to be reserved till they attained 21, to commence Business. " In the event of *George* and *Charles* (both or either of them) being settled before this Will comes in force, I provide that the next Boy (*James* or

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(both or either of them) being settled before this Will comes in force, I provide that the next Boy (James or Henry) have the benefit, and so on. The above Legacy comprehends (I conceive) Household Furniture, Linen, Plate, Books. The Lease of my House to remain in Mr. *Groombridge's* hands till my Bond Debts are paid off; Mr. *Groombridge* to receive the Rent, and, after paying the Instalment and Instalments due to Messrs. *Paxton, Godfrey, Kirk*, and himself, to give the overplus to my brother *Geo. Prestwidge*, to whom I bequeath the Lease of the House as soon as the Claims of the above Gentlemen upon it are satisfied." And, after giving certain specific Legacies, the Testatrix expressed herself as follows: "It now only remains to name my earnest desire that Mr. *Stephen Groombridge* and Mr. *Josh. Ranking* will see this my last Will and Testament punctually fulfilled according to their own understanding and judgment, desiring that their decision may not be questioned or set aside."

The Testatrix died in December 1814; and, a Suit having been instituted by her Father, for the Administration of her Estate, the Court ordered that the Interest of the Bank Annuities purchased with the Residue of her Estate, should be paid to her Father, during his life, or until further order, and declared that the Testatrix's Nephews, *George Prestwidge* and *Charles Prestwidge*, (who were Infants), would, upon their Grandfather's decease, and on their attaining 21, be equally entitled to the Bank Annuities.

The Testatrix's Father died in December 1819. By an Order of the 10th of April 1821, the Dividends of the Bank Annuities were ordered to be paid to the

Grandmother of the Infants (their Father being resident Abroad) for their Maintenance and Education during their Minorities.

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George Prestwidge died in May 1825, and *Charles Prestwidge*, in May 1829, both of them being under 21.

In May 1831, *James Prestwidge* filed a Supplemental Bill against his younger Brother *Henry Prestwidge*, an Infant, *George Prestwidge*, the Brother and Next of Kin of the Testatrix, and *Groombridge* the acting Executor, alleging that, on the death of the Survivor of *George* and *Charles Prestwidge*, he became entitled, under the Will, to have transferred to him the whole of the Funds to which they were, by the Decree, declared to be entitled on their attaining 21, and that his Brother, *Henry*, was not entitled to any Share of those Funds; and that the Testatrix had not (as the Defendant *George Prestwidge* pretended) died Intestate, in the events which had happened, as to those Funds.

The Supplemental Suit now came on to be heard as a short Cause.

Mr. *Knight* and Mr. *Blunt*, for the Plaintiff, said that this Case fell within *Jones v. Westcomb* (a); *Gulliver v. Wickett* (b); and *Murray v. Jones* (c); and that it was clearly the Testatrix's intention that, on failure of the Gift to *George* and *Charles*, *James* should take.

Mr. *Teed*, for the Defendant *Henry Prestwidge*, relied on the words, "I promise that the next Boy, (*James* or

(a) 1 Eq. Ab. 245. (b) 1 Wils. 105.

(c) 2 V. & B. 313.

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Henry) have the benefit, and so on ;” and said that the Testatrix had provided for more than one failure, and that she meant that if *George* should be settled, but not *Charles*, *James* should be substituted for him, and, if *Charles* should be settled, that *Henry* should take his place.

Mr. *Wright* for the Defendant, *George Prestwidge*, the Testatrix’s Brother, and Next of Kin, contended that, in the events that had happened, the Residue was undisposed of by the Will.

Mr. *Gurney* for the Defendant *Smith*, who was the Executor of *Groombridge*, who died pending the Suit.

The *Vice-Chancellor* said, that *James Prestwidge* could not, consistently with his Claim, rely on the literal construction of the words of the Will ; that the intention of the Testatrix was to make a Provision, out of the Fund, for two of her Brother’s Sons, and, if the Provision failed as to either *George* or *Charles*, that *James* should be supported out of it, and, if it failed as to both of them, then that *Henry* should be supported out of it.

Declare that the Defendants, *James Prestwidge*, and *Henry Prestwidge*, the Infant, are entitled, in equal Moieties, to the Funds in question in the Cause.

MEUX v. BELL.

1833:
8th June.

*Interpleader.
Demurrer.*

THIS was a Bill of Interpleader, offering to pay the Money claimed by the Defendants, to such of them as the Court should direct. One of the Defendants demurred, on the ground that the Bill ought to have offered to pay the Money into Court.

A Bill of Interpleader is not demurrable, because it does not offer to bring the Money claimed into Court. But the Plaintiff must bring it in, before he takes any step in the Cause.

Sir *E. Sugden* and Mr. *Bethell*, in support of the Demurrer, said that the Money ought to be brought into Court, in order that it might be ready to be paid to the Defendant who should be found entitled to it. They cited *Dungey v. Angove* (a); *Hyde v. Warren* (b); and the following passages from Mitf. Plead. (c): "As the sole ground on which the jurisdiction of the Court in this Case is supported, is the danger of injury to the Plaintiff from the doubtful Titles of the Defendants, the Court will not permit the proceeding to be used collusively to give an advantage to either Party, nor will it permit the Plaintiff to delay the payment of Money due from him, by suggesting a doubt to whom it is due: therefore, to a Bill of Interpleader the Plaintiff must annex an Affidavit that there is no collusion between him and any of the Parties; and, if any Money is due from him, he must bring it into Court, or at least offer so to do by his Bill."—"A Bill of this nature generally prays an Injunction to restrain the proceedings of the Claimants in some other Court; and, as this may be

(a) 3 Bro. C. C. 36.

(b) 19 Ves. 322.

(c) 4th Edit. 49. 143.

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used to delay the payment of Money by the Plaintiff, if any is due from him, he ought, by his Bill, to offer to pay the Money due into Court. If he does not do so, it is, perhaps, in strictness a ground of Demurrer."

Mr. *Jacob*, in support of the Bill.

The VICE-CHANCELLOR :

The Plaintiff is not about to take any step in the Cause, but the question is whether the Bill is maintainable. I am not aware that it is incumbent on the Plaintiff in a Bill of Interpleader, to offer, by his Bill, to pay the Money into Court: but, before he takes any step in the Cause, it is necessary that he should bring in the Money.

Demurrer over-ruled.

1833:
8th, 10th, &
12th June.

WOOD v. SKELTON.

Heir—Descent.

Testator devised his Real Estates to Trustees in Trust to pay an Annuity, and, out of the Residue of the Rents, to maintain *S. W.* (who was his Heir) until he attained 21, and, on his attaining 21, to convey the Estates to him in Fee; but, if he died under 21, then to *J. S.* in Fee. *S. W.* attained 21. Held that he took the Estates by Descent.

THE Bill stated that *Richard Skelton*, being seised in Fee of Freehold Estates, and also of Customary Estates which he had conveyed and surrendered to *Joseph Skelton*, in Fee, for such uses and purposes as he might declare by his Will, by his Will dated the 8th of August 1809, devised to Trustees and their Heirs, his Freehold, Copyhold, and Customary Estates, and all his Personal Estate

Buchanan v Harrison 1 S. & A. 673.

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and Effects, upon Trust, from time to time, to let his Freehold and Customary Estates for such term of years, at such Rents, and upon such terms, as they should think fit, during the Minority of his Grandson, *Shelton Wood*, Son of his late Daughter, *Ann Wood*, deceased, by her late Husband, *Jonathan Wood*, and to receive the Rents of his said Real Estates during the time aforesaid, and, after payment of his Debts and Funeral and Testamentary Expenses, to place out at Interest all the Residue of his Personal Estate, on Government or other Securities, in their names, and, out of the Rents of his Real Estates and the Interest of his Personal Estate, to pay to *Elizabeth Greene*, since deceased, for her life, an Annuity of 24 l., and, after payment thereof, then upon Trust, from time to time, to apply so much of the Residue of such Rents and Interest as they should think fit, for the Maintenance and Education of *Shelton Wood* until he should attain 21, and to invest the surplus at Interest; and, upon his attaining 21, to pay and transfer to him the Residue of the Rents and Personal Estate, with the accumulations thereof, after providing for the Annuity, and likewise thereupon to convey and surrender to him and his Heirs the Freehold and Customary Estates. But in case *Shelton Wood* should die before attaining 21, and without leaving any Child living at his decease, or born in due time afterwards, then the Testator directed that his Trustees should convey and surrender the Freehold and Customary Estates to his Nephew, *Joseph Skelton*, his Heirs and Assigns.

The Bill further stated that the Testator died on the 2d of January 1818, leaving *Shelton Wood* his Grandson and Heir-at-law: that, upon the death of the Testator, the Trustees entered into the possession and

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receipt of the Rents of the Freehold and Customary Estates, and so continued up to the time that *Skelton Wood* attained 21: that *Skelton Wood* attained 21 in or about the year 1820, when the Trustees put him into the possession and receipt of the Rents of the Freehold and Customary Estates: that, under the surrender and the Will, *Skelton Wood* became entitled to have the Freehold and Customary Estates conveyed and surrendered to him by the Trustees: that *Skelton Wood* died on the 28th of May 1832, Intestate and without Issue, leaving the Plaintiff, his Uncle and Heir-at-law (that is to say) the only Brother of *Jonathan Wood*, the Father of the Intestate, and, thereupon, the Plaintiff, as such Heir-at-law, became entitled to have the Freehold and Customary Estates conveyed and surrendered to him by the Trustees, and the Plaintiff applied to them to put him into the possession and receipt of the Rents thereof, and to convey and surrender the same to him; but *Joseph Skelton*, immediately upon the death of the said *Skelton Wood*, entered into the possession or receipt of the Rents of the Estates, and had assumed to himself the absolute and beneficial Ownership thereof, and intended to cut-down Timber and exercise other acts of Ownership thereon.

The Bill prayed that the Will might be established, and that the Trustees might be ordered to let the Plaintiff into the possession and receipt of the Rents of the Estates, and to convey and surrender the same to him; that an Account might be taken of the Rents received by *Joseph Skelton* since the death of *Skelton Wood*, and that he might be restrained from receiving any more of the Rents, and from cutting down Timber on the Estates; and for a Receiver.

The Defendant put in a Plea to the following effect: That the Testator was the Maternal Grandfather of *Shelton Wood*, and that *Shelton Wood* was, at the Testator's death, the Heir of the Testator, according to the customs of the Manors in the Bill mentioned *, and that it was by and through the Mother of *Shelton Wood* that he became related in blood to the Testator, and that the Father of *Shelton Wood* was not related in blood to the Testator; and that the Defendant was the eldest Son and Heir-at-law, and also Customary Heir of *Joseph Shelton*, deceased, who was the eldest Brother of the Testator, and that the Defendant, upon the death of *Shelton Wood*, became and then was the Heir-at-law and Customary Heir of the Testator, and also Heir-at-law and Customary Heir of the Mother of *Shelton Wood*, and also the Heir-at-law, *ex parte Maternâ*, and Customary Heir *ex parte Maternâ*, of *Shelton Wood*.

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Mr. *Knight* and Mr. *Rudall* in support of the Plea :

Skelton Wood took both the Freehold and Customary Estates by descent; for he took an Estate which was the same, both in quantity and quality, as he would have taken by descent.

The Testator had the Equitable Interest only in the Customary Estates; and, as there are no degrees of Equitable Estates, *Skelton Wood* took precisely the same interest in the Customary Estates as the Testator himself had.

* The Plea omitted to aver that *Skelton Wood* was the Heir-at-law of the Testator, probably, because the Bill stated him to be so.

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With respect to the Freeholds, the Devise to the Trustees did not break the descent: the Legal Estate was vested in the Trustees for the purpose, merely, of giving effect to the Trusts prior to the Devise for the benefit of *Skelton Wood*. *Emerson v. Inchbird* (a); *Clarke v. Smith* (b); *Chaplin v. Leroux* (c); *Hutcheson v. Hammond* (d); *Selby v. Alston* (e); *Preston v. Holmes* (f); *Harris v. Bishop of Lincoln* (g); *Hurst v. The Earl of Winchelsea* (h).

The only question is, whether the Executory Devise over in the event of *Skelton Wood* dying under 21 without leaving a Child living at his decease, prevented him from taking by descent. The Cases of *Chaplin v. Leroux*, and *Doe v. Timins* (i); (which overrule *Scott v. Scott*) (k); are decisive authorities that such was not the case.

Sir *E. Sugden* and Mr. *Tamlyn* in support of the Bill :

The Cases that have been cited as to the effect of Charges preceding the Gift to the Heir, do not bear upon the present question; for, whatever Interest may

(a) Lord Raym. 728.

(b) Comyns, 72; S. C. 1
Lutw. 244.

(c) 5 M. & S. 14.

(d) 3 Bro. C. C. 128.

(e) 3 Ves. 339; S. C. 2
Doug. 771.

(f) Styles, 148.

(g) 2 P. W. 135.

(h) 1 Blackst. 187; S. C. 2
Burr. 879.

(i) 1 Barn. & Ald. 530.

(k) Amb. 383; S. C. 1
Eden, 458. See Sergeant
Hill's Note on this Case, in
Mr. *Blunt's* edition of *Am-*
bler, and in 1 Barn. & Ald.
542. See also *Manbridge*
v. Plummer, 2 Myl. & Keen,
93.

be taken out of the Fee Simple and given to other Persons, if the remainder is not disposed of, or is given to the Heir, he will take it as Heir. The question is not what is the effect of that which precedes the vesting in the Heir, but what is the effect of the Gift over.

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In *Hutcheson v. Hammond*, it is true that the Legal Estate was devised to the Trustees, but the Legacy of 1,000 l. became absolutely lapsed by the death of the Legatee in the lifetime of the Testatrix, and there was no Gift over; and, therefore, it was considered as a portion of the Real Estate wholly undisposed of. That Case however, has always been considered of very doubtful authority.

Harris v. The Bishop of Lincoln, does not apply. There was an actual Gift of the Residue of the Rents of the Lands, to the Testator's right Heirs on his Mother's side; and the question was whether the Testator intended the Heir of his Mother's Father, or the Heir of his Mother's Mother to be preferred. The question was a question of Construction, and not of Descent.

Hurst v. The Earl of Winchelsea has no bearing on the present question. It was considered to be wrongly decided, and was taken to the House of Lords, and the Appeal was ultimately compromised (1). In that Case, a person who was seised in Fee, executed a Settlement, by which she reserved to herself a general

(1) 2 Burr. 882. See the Observations on this Case in Sugd. Pow. 4th Edit. 331, and in 1 Powell on Devises Jarman's Edit. 425, note.

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Power of Appointment by Deed or Will, and, in default of Appointment, she limited the Estate to herself in Fee. She, afterwards, by her Will, exercised the Power in favour of her Son, who was her Heir-at-law, in such a way that, if she had devised the Estate to him, he would have taken by descent, and it was held that he took the Estate by descent. That decision had reference to the prior seisin of the Appointor; but, even on that ground, it is hardly possible to maintain it.

The Case of *Selby v. Alston* decided, merely, that there was no Equity between Heirs.

We now come to *Scott v. Scott*. Putting out of sight, for the present, the devise to the Trustees which is found here, that Case is the same as this; and it is an express authority in our favour. It must, however, be admitted, that *Doe v. Timins* is an authority against *Scott v. Scott*, and that they cannot both stand together. But we contend that the latter decision is right. Lord Keeper *Henley*, in his Judgment in *Scott v. Scott*, says that the eldest Son took by devise, as having, under the Will, a different Estate from what would have descended to him, the one being pure and absolute, the other not. If an Estate be devised to the Eldest Son of a Testator and his Heirs, with an Executory Devise over if he dies under 21, can it be said that he takes the same Estate in quantity and quality as he would have taken if the Estate had descended upon him? Those who maintain that proposition, must be prepared to say that the Executory Devise over has no effect. In *Chaplin v. Leroux*, Mr. Justice *Bayley* is reported to have said that a Fee mounted on a Fee,

does not turn the first into a Base Fee. This we apprehend is a mistake : for, until the event on which the Estate is given over, becomes incapable of taking effect, the first taker can have nothing more than a limited or qualified Fee. The Learned Judge seems to have formed an opinion, which is not founded in Law, that a Devise to a Man in Fee, with an Executory Devise over, creates a pure Fee Simple from the beginning, where the Executory Devise does not take Effect. That is a proposition which is wholly untenable : the Devisee takes a limited Fee when the Estate first vests in him ; and, as that is the time at which the quantity and quality of the Estate must be looked at in order to determine whether it is taken by descent or by devise, it is impossible to hold that an Estate which is liable to be defeated on the happening of a certain event, can be taken by descent. It appears that Mr. Sergeant *Hill* thought that the decision in *Scott v. Scott* was right, though he thought that the reasons given for it were wrong. Mr. *Watkins* also, in his Essay on Descents (m), seems to consider that Case to have been rightly decided. In *Doe v. Timins*, Mr. Justice *Bayley* disposes of *Scott v. Scott*, by merely observing that it had received a sufficient answer in argument at the Bar. But the only answer that it had received at the Bar, was that it had not met with the general approbation of the Profession. That, however, we deny ; for many eminent Lawyers think that it was rightly decided ; and we submit that the reasoning on which *Doe v. Timins* was decided, is not such as to show, satisfactorily, that *Scott v. Scott* was properly over-ruled.

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(m) See p. 179.

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This Case, however, is distinguishable, as far at least as the Freeholds are concerned, from *Doe v. Timins* and all the other Cases, for here there was no Trust executed, but merely a Trust Executory. *Bastard v. Proby* (n). *Skelton Wood* could not have called for a Conveyance of the Legal Estate until he attained 21, when the Devise over would be defeated, and, therefore, until he attained that age, it could not be predicated of him that he had any Equitable Fee: he had no right whatever, in Equity, except to have a portion of the Rents applied for his maintenance, and, on his attaining 21, to have the Legal Fee conveyed to him. The descent, therefore, was clearly broken as to the Freeholds.

Mr. Knight in reply:

It is admitted that, if *Doe v. Timins* be rightly decided, it is an authority in our favour. That Case was decided after an elaborate argument, in which *Scott v. Scott* was thoroughly sifted. *Chaplin v. Leroux*, which was an earlier Case, decided the same point; and those two Cases cannot now be over-ruled, without unsettling the established Law of Real Property. We do not mean to impugn the decision in *Scott v. Scott*. That decision was right, on the ground that an intention of Bounty to the Heir was expressed in the Will, but not for the reasons attributed to Lord *Henley*.

If a Testator says: "If *A. B.* return from *Rome* in 20 years, I give my Estate to him," it has been long settled that the Heir takes by descent, in the mean time. If *A. B.* does not return, does the Heir take

(n) 2 Cox, 6.

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less by descent? Can it make any difference, if the Testator says: "I give my Estate to my Heir, if *A. B.* do not return from *Rome* in 20 years?" Again, can the circumstance that it is an Equitable Estate, make any difference; or is there any difference between a Devise to a Trustee in Trust to convey to the Heir, and a Devise unto and to the use of the Trustee in Trust for the Heir? *Selby v. Alston* was argued on the assumption that the Estate had descended.

The VICE-CHANCELLOR:

I have very carefully considered the Plea in this Case, which consists of several affirmative propositions, and one negative one; and I am of opinion that, if proved, it will be a complete answer to the Plaintiff's case, that is, on the supposition that the view of the Law which the Defendant takes, is correct. With respect to that point, after the decisions in *Chaplin v. Leroux* and *Doe v. Timins*, I do not think that I ought to send a Case for the opinion of a Court of Law upon the legal question.

What Mr. Sergeant *Hill* says, in his note, with reference to the Case of *Scott v. Scott*, seems to me to be correct, namely, that the decision is right, but that the reason assigned for that decision is wrong and unnecessary.

The course, therefore, which I shall take, is to allow the Plea, leaving the Parties to appeal (if they think proper) to the House of Lords, where they can have the whole question at Law reviewed with the assistance of the Judges, and the question of Equity, if there be any after the question of Law is decided, determined by

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the highest Equitable tribunal. Supposing, however, that the Law shall be unshaken, I do not see any substantial difference between the Case at Equity and the Case at Law.

Plea allowed.

1833 :
6th June and
18th July.

Practice.
Production of
Documents.

Motion by a
Defendant for
the Production
of a Document,
admitted by the
Plaintiff to be
in his custody,
refused.

MILLIGAN v. MITCHELL.

ABOUT the year 1798, a Chapel was built by subscription, at *Woolwich*, for the use, as the Bill alleged, of the *Scotch* Presbyterian Congregation there established, and for maintaining among them the Doctrine, Discipline and Worship of the Established Church of *Scotland*, and to be always under the Ministry of a Person licenced and ordained according to the regulations of that Church: and, by an Indenture of the 14th of July 1800, a Lease of the Chapel and of the Ground on which it had been erected, was granted for 61 years, to certain Persons of whom the Defendant *Martin* was the survivor, in Trust to be assigned and disposed of as the Elders and Trustees of the Chapel, for the time being, should direct, and, in the meantime, in Trust to permit the same to be used as a place of Religious Worship, and for such other purposes as, by the practice of the Church of *Scotland*, the same ought to be used.

The Bill was filed by two of the Trustees of a Donation for the benefit of the Presbyterian Chapel of

Woolwich, one of whom was also an Elder of the Chapel, against the other Trustees and Elders, and also against *Martin*, setting forth (amongst other things), several entries in a Minute-book, kept by or under the superintendence of the Minister and Elders of the Chapel, of the Resolutions agreed to at Meetings of the Congregation, relative to the regulation and government of the Chapel and the general affairs thereof; one of which Resolutions was as follows: "That no Minister be appointed Pastor of this Congregation, who hath not been licensed to preach the Gospel according to the Regulations observed in the Established Church of *Scotland*." The Bill further stated that the office of Minister of the Chapel having become vacant, the Defendants, in breach of the trust reposed in them and in violation of the purpose for which the Chapel was established and to which it had been devoted, and contrary to the Rules and Regulations of the Established Church of *Scotland*, had engaged and employed Ministers who were Seceders from that Church, or who belonged to the different denominations of Dissenters in *England*, to preach in the Chapel, and that the Defendants intended to procure the Election of one of those Persons to be the Minister of the Chapel, and altogether to change the purpose for which it was devoted: that the Defendants were acting in pursuance of a design to frustrate the Trusts which had devolved upon them, and they claimed a right so to do as constituting a majority of the Trustees and Elders of the Chapel, and to administer the affairs thereof to the exclusion of the Plaintiffs and for the purpose of preventing the same from continuing to be subject to the Rules or Regulations of the Church of *Scotland*. The

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Bill prayed (amongst other things) that it might be declared that the Lease of the Chapel was vested in the Defendant, *Martin*, in Trust as a place of Religious Worship according to the Institutions and Observances of the Church of *Scotland*, and subject to the Laws and Regulations thereinbefore mentioned as having been agreed to, by the Congregation, for the government of the Chapel, and that no Person was eligible to the pastoral charge of the Chapel who was not a Licentiate or Probationer of the Established Church of *Scotland*, and that the Defendants might be decreed to perform such Trusts, and to proceed to the Election of a Person duly qualified to be a Minister of the Chapel according to the Rules and Regulations aforesaid and the usage of the Established Church of *Scotland*, and that they might be restrained from employing or permitting any Person not being a Probationer, Licentiate, or ordained Minister of the Church of *Scotland*, from officiating in the Chapel, and from preventing any Person, being such Probationer, Licentiate or ordained Minister, from preaching and conducting Public Worship therein.

The Plaintiffs, in support of a Motion for the Injunction prayed by the Bill,* had made an Affidavit in which the Plaintiff *Sharp* deposed that, in 1825, he was appointed Clerk to the Minister and Elders in Kirk Session of the Chapel, and that he continued to act in such office until Feb. 1831, when, in consequence of the proceedings mentioned in the Bill, he declared his intention to resign his office: that, as

* See a report of that Motion in 1 Myl. & Keen, 446.

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such clerk, he had, and, until the due appointment of a Minister to the Chapel should take place and a new Kirk Session be thereby constituted to whom the Books might be delivered up, he still retained the custody or possession of the Minute-books belonging to the Kirk Session, and, among others, he had in his custody the Book in the Bill mentioned to have been kept by or under the direction or superintendence of the Minister and Elders of the Chapel.

The Defendants now moved that the Plaintiff, *Sharp*, might be ordered to produce on oath and leave with his Clerk in Court, the Books so admitted to be in his possession, and that the Defendants might be at liberty to inspect the same, and take extracts therefrom or copies thereof.

Mr. *Agar* and Mr. *Kindersley*, in support of the Motion :

It appears, by *Sharp's* affidavit, that the Books in question came into his possession as Clerk to the Kirk Session of the Chapel, and that, though he has resigned that office, he still retains them. They are admitted to be common property. The Plaintiffs state that the grounds on which they rest their Case, appear in the Minute-book, and they give, in their Bill, extracts from it. If we are allowed to look at that Book, we may be able to extract passages from it in support of our defence. If we were to file a Cross Bill for a Discovery, we should not be able to get in the answer to it, until we had put in our answer. We have the interests of others to protect; and the production of those Books is necessary to enable us to make our defence.

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[The *Vice-Chancellor* :—You do not state so in your Affidavit.]

No: but the description given of the Minute-book by the Plaintiffs in their Bill and Affidavit, shows that it is necessary for us to see it in order to make our defence. It will show what the end and intention of this Institution was. We may find entries which show that the Plaintiffs' representation of the contents of the Book is garbled. In a Court of Law, it is usual for a Judge on being applied to, to order a Party to produce a Document which is necessary to enable his adversary to make out his Case.

All the individuals who constitute the body which represents the Congregation at large, are Parties to this Record, two of them are Plaintiffs, and six others Defendants. The Congregation acts by its Elders; and we are the majority of them. *Hampden v. Hampden* (a); *Princess of Wales v. Lord Liverpool* (b); *Jones v. Lewis* (c); *Attorney-general v. Brooksbank* (d); and *Pract. Reg. Ed. Wyatt*, p. 161, "Where a Deed in the Plaintiff's hands, mentioned in the Plaintiff's Bill, was necessary to the Defendant's making his defence a full Answer; the Court ordered the Plaintiff should give him a Copy of it."

Mr. *Blenman* for the Plaintiffs, said that the Order made by Sir *John Leach*, V. C. in *Jones v. Lewis*, was discharged by Lord *Eldon* (e); that there was no

(a) 3 Bro. P. C. 551.

(b) 1 Swanst. 114, 580, &
3 Swanst. 567.

(c) 2 Sim. & Stu. 242.

(d) 1 Youn. & Jer. 439.

(e) See Ante Vol. IV. 324.

instance of an application similar to the present being granted, except in the case of *The Princess of Wales v. Lord Liverpool* (f); which could not be considered as establishing any general principle.

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The VICE-CHANCELLOR :

It is contrary to the general tenor of the Practice of this Court, to order a Plaintiff, on the application of a Defendant, to produce a Document in his custody; and I do not think that I am bound to follow the decision in *The Princess of Wales v. Lord Liverpool*, except in a Case precisely similar to it. There were specialties in that Case, which do not occur in this; and I think that this Motion ought to be refused with Costs.

(f) See *Pickering v. Rigby*, 18 Ves. 484; and *Spragg v. Corner*, 2 Cox, 109. See *Leitch v. Leitch*, 10 Ves. 100. *See also Taylor v. Manning*, 4 Beav. 285.

HESLOP v. THE BANK OF ENGLAND.

1833:
10th June.

*Bank of
England.
Production of
Books, &c.*

To a Bill for a Discovery of Stock standing in the name of the Plaintiff's late Father, either alone or jointly, for 20 years before and at his death, and for an Inspection of the Bank Books containing the Entries of such Stock, the Bank in their Answer set forth an Account of the Stock, but declined to set forth a List of the Books containing the Entries. Held that they were not exempted from the production of their Books, and, therefore, ought to set forth a List of them.

IN November 1829, the Plaintiff filed an original Bill against *T. Metcalfe*, *H. S. Partridge* and *Mary Frances* his Wife, stating that *Luke Heslop* (who died in June 1825), bequeathed the Residue of his Estate and Effects to his Wife, *Dorothy Heslop*, for life, and, after her death, to the Plaintiff, his Son, and to the Defendant, *Mary Frances Partridge*, his Daughter, in such Shares as his Wife should appoint, and that he appointed her his Executrix: that she possessed his Personal Estate, which was more than sufficient to pay his Debts, and died in December 1827, without having exercised the Power, but having appointed the Defendant, *Metcalfe*, her Executor; and that, on the death of *Dorothy Heslop*, the Plaintiff and his Sister became entitled to the Testator's Residuary Estate in equal Moieties. And the Bill prayed that the Plaintiff might be paid his Share thereof.

In February 1832 the Plaintiff filed a Supplemental Bill against the Bank and the Defendants to the original Bill, alleging that *Metcalfe*, in his Answer to the original Bill, said he had heard *Dorothy Heslop* say, and he believed that the Testator's Personal Estate was not sufficient to pay his Debts, and that she did not possess herself of any Stock in the Funds belonging to the Testator, for that the Testator had not, at his death, any Stock belonging to him: that the Testator was a man of considerable Property, and the Plaintiff was convinced he died possessed of Personal Estate

much more than sufficient to pay his Debts: that the Plaintiff had been lately informed that the Testator, within 20 years before, and at his death, was possessed of divers Sums of Stock standing in his name alone, or in the names of himself and some other Person or Persons in Trust for him: that the Testator was fraudulently induced by his Wife, from time to time, to sell out some of such Stock, and she possessed herself of the proceeds thereof, and, after his death, she sold out other parts of the Stock and applied the proceeds to her own use: that the Plaintiff had applied to the Bank to be informed, or be at liberty to search their Books in order to ascertain what Sums of Stock were standing in the Testator's name alone, or in the names of any other Person or Persons as a Trustee or Trustees for him, within 20 years previous to and at his death, and the times when, and the names of the Persons to whom the same were transferred; but the Bank, combining with the other Defendants, had refused to give any such information: that, if the Plaintiff did not obtain from the Bank the discovery sought by the Bill, and was not permitted to search their Books, he should be unable to make out what Property the Testator was possessed of at his death, and should be deprived or defrauded of his share thereof: that the Bank ought to set forth a List of their Books in which were contained any entries of the Sums of Stock so as aforesaid standing in the name of the Testator alone, or in the names of the Testator and any other Person or Persons. The Supplemental Bill prayed that the Plaintiff might be at liberty to search the Bank Books from the period of 20 years previous to the Testator's death to the present time, and that the Governor and Company might be re-

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strained from transferring or permitting to be transferred, to *Metcalfe*, the Stock standing in the name of the Testator alone, or in the names of the Testator and and any other Person or Persons.

The Bank, in their Answer, said that they had (as required by the Bill) set forth, in a Schedule, an account of all Sums of Stock which they believed were standing in the name of the Testator alone, or in the joint names of the Testator and any other Person or Persons within the period of 20 years previous to and up to his death, and by and to whom, and at what times the same were transferred, and what Sums of Stock were then standing in the name of the Testator and in the name or names of such other Person or Persons: that no entry of Transfer in their Books, ever stated whether such Transfer was made in Trust or otherwise; that they had caused their Accountant to inspect their Books, and had been informed by him, and they believed that no other Sum of Stock was standing in the name of the Testator alone, or in the names of the Testator and any other Person or Persons, within the period before mentioned; that the Plaintiff had not applied to them for permission to search their Books; but, if he had made any such application, they should have refused to comply therewith, because their Books were Public Records, and related to the National Debt, and contained entries relating to the transactions and private affairs of numerous Persons: that, from the numbers of persons of the same name and frequently of the same or very similar descriptions having Stock in the Public Funds, they should lay a foundation for great and extensive Frauds, and, many times, should occasion

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great inconvenience from mere errors and mistakes, if they allowed Executors or other Persons to make any general search in their Books, and, therefore, though they furnished information of the Stock standing in the name of any individual when inquiry was made by a Person lawfully entitled thereto, yet they never permitted Persons to search such Books; and they apprehended, with reference to the duty which they owed to the Public and to the other Proprietors of Stock, that they should not be justified in so doing: that, having made the disclosure and discovery aforesaid, the Plaintiff would be able to make out the Property that the Testator was possessed of at his death, and would not be deprived or defrauded of his Share thereof by reason of his not being permitted to inspect their Books, which, for the reasons aforesaid, they submitted he ought not to be allowed to do; and, for the reasons aforesaid, they insisted that they were not compellable to set forth a List of their Books containing the entries in the Bill mentioned.

The Plaintiff having excepted to the Answer because it did not contain a List of the Books, and the *Master* having over-ruled the exception, the Plaintiff excepted to the Report.

Mr. *Knight* and Mr. *Bichner*, in support of the Exception, said that the Bank of England were not entitled to any greater privilege or exemption than any other public Trading Company: that their Answer was not put in on oath, and the Account set forth in it was merely from the statement of their Clerks: that the Plaintiff was entitled to inspect the Books containing

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the entries mentioned in the Bill, and, consequently, that the Defendants ought to have set forth a List of them, in order that the Plaintiff might move for their production.

The *Attorney-general* and Mr. *Phillimore*, in support of the Report, contended that the Bank ought not to produce their Books, for the reasons stated in the Answer, and, consequently, that they could not be required to set forth a List of them.

The *Vice-Chancellor* said that it was not pretended that there was any Act of Parliament which exempted the Bank from producing their Books, and therefore he saw no reason why they should decline to set forth a List of them.

Exception allowed.

STRONG v. INGRAM.

RICHARD TRAVERS, of *Uploders*, by his Will dated the 8th of January 1804, duly executed and attested, devised certain Real Estates to *Elizabeth Ellen Ehins*, her Heirs and Assigns, and gave all his other Freehold, Leasehold and Copyhold Estates, and all his Personal Estate and Effects, to *John Strong*, and *Richard Roberts*, their Heirs, Executors, Administrators and Assigns, upon Trust to sell all his Estates and Effects, and convert the same into Money; then, upon Trust to discharge his just Debts and Funeral Expenses, together with any other Expenses; then, upon Trust to apply all the remainder towards the payment of the Legacies thereafter by him given: first, to his Trustees, 500 l. a-piece, by way of compensation for their trouble in the execution of their Trust; to *Elizabeth Ellen Ehins* the sum of 500 l.; to *Susannah*,

1833:
10th and 31st
June, and 5th
November.

Will.
Construction.
Legacies.

Testator directed his Trustees to sell his Real and Personal Estate, and to apply the Produce in paying his Debts, and the Legacies thereafter given. The Testator afterwards gave Legacies by Codicils, one of

which was duly attested. Held that only the Legacies in the Will were payable out of the Real Estate. *11 Sim. 216.*

Cumulative Legacies.—Testator, by a Will duly attested, gave Legacies to various Persons, charged upon his Real and Personal Estates, and payable at the end of two years after his death, and he directed that, if his Property should be more than sufficient to pay the Legacies, they should be increased proportionably. By an *unattested* paper, purporting to be Instructions for a Will, but admitted to Probate, the Testator gave Legacies to many of the Legatees in the Will, either individually or as members of a Family; but the directions as to the time of payment and the increase of the Legacies were omitted. Held that the Legacies in the *unattested* Paper were not substitutional for the Legacies in the Will, but Cumulative.

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the Wife of *John Honeybourn*, *Frances*, the Wife of *John Hansford*, and *Peggy*, the Wife of *Joseph Best*, the Interest of 200 l. each, for their lives, and after their respective deaths, the Principal to be divided amongst their Children then living; to *Sarah*, the Wife of *William Hyde*, and *Mary*, the Wife of *John Gill*, *Mary*, the Wife of *Thomas Garland*, and *Audrey*, the Wife of *Robert Hallett*, 200 l. each; to *John Lawrence*, 200 l.; to *Henry Gibbs*, 100 l., and, to his Sisters, the like Sum of 100 l., to be equally divided between them. And the Testator gave 200 l. equally between the Children of *Jane* who married at *Richmond*, and whose maiden name was *Lawrence*; 100 l. to *Anne Lawrence*; 100 l. to *Joan*, the Wife of *Thomas Cook*; 100 l. each to *Richard Gill* and *Robert Gill*, Sons of the late *Matthew Gill*; 500 l. to *Robert Roberts*, of *Gorwell*; 50 l. each to the Children of the late *William Roberts*, of *Bristol*; to the Wife of *Henry Richards*, the Interest of 200 l. for her life, and, after her death, the 200 l. to be divided equally between her Children; to *Grace Roberts*, 200 l.; to Mrs. *Fanny Roberts*, 550 l.; 50 l. each to *Richard Sabine*, *Thomas Sabine*, *Sydenham Sabine*, and *Agnes Taunton*, the Wife of *Thomas Taunton*; to such of the Sons of *John Burt* as should be living at the Testator's decease, 50 l. each, and a further Sum of 200 l. to *Thomas G. Burt*, Son of *John Burt*; to *Ann Way*, daughter of *George Burt*, 100 l.; to *Josh. Bowring*, *George Bowring*, *Elizabeth Weaver*, and *Mary Genge*, 50 l. each; to *Jane Axe*, 100 l.; to *John Axe*, jun., 20 l.; to *John Strickland*, 20 l.; to Captain *Ingram*, one half of the Testator's Wines and Spirituous Liquors; to *John Sutherland*, *Thomas Southcomb*, and *Thomas Knight*, 100 l.

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each; to the Rev. *Robert Hunter*, *George Knight*, and *Edward Dally*, 10 l. each; to his (the Testator's) Servant, *Elizabeth Bagg*, 100 l., and the further Sum of 10 l. for Mourning; to his Servant, *John Budden*, 50 l. and the further Sum of 5 l. for Mourning; to his Servant, *John Gill*, a complete Suit of Clothes; to *Henry Gale*, 20 l.; to *George Hart*, 50 l.; to the Vicar of *Loders*, 10 l., if not resident, to the Curate at the time, for a Sermon on the Sunday after the Testator's burial; to the Clerk of *Loders*, two Guineas. The Testator then directed where he was to be buried; and afterwards gave to the Rev. *Samuel Strong*, 200 l.; to *Robert Strong*, *Elizabeth*, *Mary*, and *Grace Strong*, equally to be divided amongst them, the Money that the Testator had sold *Halstock* and *Bonvill* Estates for, as they were the next Heirs to it; to *Thomas Marsh*, 10 l.; to his Servant *John Bagg*, a complete Suit of Clothes; to *Elizabeth Rideout*, 50 l.; to the Children of the late *Sarah Sawkins*, equally to be divided amongst them, 200 l.; to *Henry Hine*, 20 l.; to *John Courtney*, 5 l.; to *John Axe*, jun., in Trust, 100 l., to lay out 10 l. annually, in Fire or Bread for the Poor of *Loders*, whichever should be judged, by the Vicar and himself, to be the most wanted, the Money to remain in *John Axe*'s hands, which he was to have the use of for his trouble; to the Vicar and Churchwardens of *Netherbury*, 10 l., to be given in Bread to the Poor. The Testator then gave the other half of his Wines and Spirituous Liquors to Mrs. *Roberts*, and Mrs. *Ekins*, equally between them, with a Hogshead of Strong Beer each; and to *Elizabeth*, the Wife of *William Davis*, 200 l. "If I should have omitted any one of my First of Kin, either on my

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Father or Mother's side, and not have left any Legacy to them or their Children, my will is that they shall have 200 *l.*, the same as the others of the same kindred have had given them by my Will. I do direct that my Trustees shall not be obliged to pay the Legacies till two years after my death, without the Property is sooner disposed of. If the Legacies given should be found to exceed my Property, my will is that a proportionate abatement shall take place on each Legacy that I have given; on the contrary, if it should exceed it, to have the like proportion added to each Legacy. And I appoint the said *John Strong* and *Richard Roberts* joint Executors in Trust of this my last Will and Testament."

The Testator, by an unattested Codicil, dated January 1805, bequeathed 5 *l.* a year to *John Gill*, sen. for his life, to be paid by his Trustees *John Strong* and *Richard Roberts*: and, after giving directions respecting the settling of an account between himself and Mr. *Richard Roberts*, he bequeathed to his Servants, *Elizabeth Bagg* and *Lyria Hansford*, certain articles of Plate and Household Furniture, with a Legacy of 20 *l.* to the latter; to Mrs. *Fanny Roberts*, his Tea and Dessert Spoons, and a quarter part of his Wines and Spirituous Liquors; and, to Mrs. *Ekins* the other quarter part and a Silver Tankard; to *Mary Sutherland*, a Gold Watch and Chain and 100 *l.*; to *Susannah Honniborne*, the part of the Dwelling-house that she then lived in, with half the Plot and the whole of the Garden adjoining and to her Daughter, *Audrie Clark*, the other part of the Dwelling, the Garden adjoining, with half the Plot; to *Thomas Banger*, 10 *l.*; to *John Gill*, jun. the whole of what he might

owe to the Testator at his decease, and likewise a House and Orchard in the occupation of *John Bagg*; to *William Hyde* what he might owe to the Testator at his decease; and, to his Son, *Richard Hyde*, the House, Orchard and Garden occupied by *J. Symes*; and to *J. Hansford's* eldest Son, the House and Orchard in the occupation of *Ann Matthews*.

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At the foot of the Codicil, the Testator wrote as follows :—

“ Wednesday Evening, 9th January 1805.

“ *N. B.* This is not gone on with, but, so far, my wish is (though not signed) that all on this Paper be ratified and confirmed by whom it may concern,

“ *Richard Travers.*”

The Testator made another Codicil, dated the 26th of June 1806, which was duly executed and attested; and, after reciting that *Ellen Ekins* had died since the making of his Will, he directed that the Estates and Legacies thereby given to her, should sink into his Residuary Estate; and he revoked the Bequest in his Will to *Elizabeth Strong*, *Mary Strong* and *Grace Strong*, of the Monies for which his Lands at *Halstock* and *Bonwill* sold for, and gave such Monies to their Brother, *Robert Strong*; and, to *Elizabeth*, *Mary*, and *Grace Strong*, 200 l., equally to be divided between them; 100 l. to *Samuel Way*; and to *Henry Way*, Son of *Samuel Way* of London, 100 l.; to *William Way* and *Mrs. Harrington*, the Brother and Sister of *Samuel Way*, 50 l. each; to *Elizabeth Bagg*, 100 l. more than he had given her by his Will; to *Thomas Sabine*, the further Sum of 100 l., in consideration of the trouble he had

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taken about the Testator's concerns. And he gave the share of his Wines and Spirituous Liquors, which he had given by his Will to *Ellen Ehins*, to Mrs. *Fanny Roberts* in addition to what was therein given to her.

The Testator made another Codicil or Testamentary Paper, not duly attested, which was as follows :—

An account of *Richard Travers's* Relations :

	£.
John Strong - - - - -	1,000
Samuel Strong - - - - -	1,000
Mrs. Davis and Children - - - - -	1,000
John Burt's Children - - - - -	1,000
Bowring Family - - - - -	1,000
Sabine family (Mr. Taunton, under Trust)	150 each.
Way family, in London - - - - -	400
Richard Roberts's Children, of Burton -	200 each.
Robert Roberts's Children, of Gorwell -	1,000
Mrs. Richards (under Trust), to be equally divided at her death, between her two Children - - - - -	1,000
Mrs. William Roberts and family at Bristol, to be divided between her children after her death - - - - -	1,000
Richard and Robert Gill - - - - -	500 each.
Susan Honeybourn and Family - - - - - and the House and Plot she lives in.	600
Sarah Hyde and Family - - - - -	1,000
Fanny Handsford (in Trust), and Family	100
Molly Gill and Family - - - - -	1,000
Captain Lawrence, Exeter - - - - -	500
Mrs. Ann Knight, of Burton - - - - -	100

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Peggy Best, late Jenny Lawrence's two	£.	1833.
Children in London, if living - -	50 each.	STRONG
Henry Gibbs - - - - -	300	v.
John Hallet, of Shipton - - -	400	INGRAM.
Henry Gibbs's two married Sisters -	25 each.	
Henry Gibb's maiden Sisters - -	25 each.	
Henry Gibbs, sen. of Bradpole - -	10	
John Sutherland's two Children, William		
and Mary - - - - -	25 each.	
Mrs. Cooke, of Neddlecombe - -	100	
Josh. Way, jun. Son of Ann Burt -	200	
John Budden, late Servant - - -	100	
John Axe - - - - -	100	
Betty Bagg, 300 <i>l.</i> to her own sole use.		
Henry Gale, of Upton - - - -	20	
Mary Sawkins - - - - -	100	
Poor of Uploders, - - - - -	50	
Poor of Loders - - - - -	50	
Clerk of the Parish - - - - -	5	

“ These are the instructions given by *Richard Travers* to *Giles Russell*, to make his Will by to-morrow morning: July the 27th, 1813.

“ *Richard Travers.*”

The Testator died on the 28th of July 1813, and a Suit having been instituted for the administration of his Estate, a Report was made, by the *Master*, in the course of the Cause, finding that the Legatees to whom Legacies were given by the Will, and also by the two Codicils of 1805 and 1806, and the Testamentary Paper of 1813, were entitled to all the Legacies thereby given; and that none of the Legacies given by either of the Codicils or by the Testamentary Paper, was a

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substitution for any Legacy given, by the Will or by the other Instruments, to the same Legatee; that the Codicil of 1805, and the Testamentary Paper of 1813, not having been executed so as to pass Real Estates, *and the whole of the Stock in Court in the Cause having arisen, wholly, from the Testator's Real Estates*, the Legatees named in those two Instruments, were not entitled to any part of such Stock.

There being no Funds for payment of the Legacies, except the Stock in Court, one of the Legatees, who was named in the Testamentary Paper alone, took exceptions to the Report, insisting that the *Master* ought to have reported that the Legacies bequeathed by the second Codicil and by the Testamentary Paper, were payable out of the Funds in Court: that the Legacy given to any Legatee by the Testamentary Paper, was in substitution of the Legacy or Legacies given to the same Legatee by the Will or by the Codicils, or either of them: that the Legacies given by the Testamentary Paper to the *Sabine* Family and to the *Bowring* Family, were respectively in substitution for the Legacies given by the Will and second Codicil to *Richard, Thomas, and Sydenham Sabine* and *Agnes Taunton*, formerly *Agnes Sabine*, and to *Joseph and George Bowring, Elizabeth Weaver*, formerly *Elizabeth Bowring*, and *Mary Genge*, formerly *Mary Bowring*. The Exceptions then proceeded to point out other instances in which Legatees in the Will took Legacies under the Testamentary Paper, either as individuals or as members of a Family, and to insist that the latter were in substitution for the former; and the last Exception contended that the Testamentary Paper was intended to operate as a revocation of the several Legacies

given by the Will and Codicils, to all the Legatees therein named.

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The Attorney-general, Mr. Knight, Mr. Rolfe, Mr. Norton, Mr. Bellamy, and Mr. Reynolds in support of the Exceptions :

The *Master* cannot be right in holding that the Legacies given by the attested Codicil are Charges on the Land, and that the Legacies given by the unattested Codicils are not Charges on the Land. The attested Codicil contains no words to charge the Land; it merely gives Legacies; and, consequently, the distinction which the *Master* has drawn between the attested and the unattested Codicils, cannot be supported.

The Testator has devised all his Real and Personal Estate to Trustees, in Trust to sell and convert the same into Money, and then upon Trust to discharge his Debts and Funeral Expenses, and to apply all the remainder towards the Payment of the Legacies thereafter by him given; and, at the conclusion of his Will, he directs that, if the Legacies are not sufficient to exhaust the fund, they shall be increased proportionably. He has, therefore, converted his Real Estate, out and out, into Personalty, and has given away the whole in certain definite Legacies. By the Testamentary Paper, he has done nothing but modify the Legacies which he had before charged upon the mixed Fund; and, consequently, the Legacies given by that Paper (although it is unattested), are Charges on the Land. *The Attorney-general v. Ward (a); Durour v. Mot-*

(a) 3 Ves. 327.

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teux (b); *Kennell v. Abbott (c)*; *Maugham v. Ma-
son (d)*; *Green v. Jackson (e)*; *Jackson v. Jack-
son (f)*.

The Testamentary Paper appears, on the face of it, to have been intended to be a substitution for the prior Instruments. When we look at the heading and at the conclusion of it, and when we see that most of the Legatees in the Will and Codicils are entitled, either as individuals or as members of a Family, to Legacies under it, is it possible to say that the Testator did not intend it to comprise all his Testamentary Dispositions, but that he merely meant to make additions to his Bequests? The Gifts to *Susan Honeybourn* and to the Clerk and Poor of the Parish especially, show that the Testator intended the Testamentary Paper to be a substitution for the Will and Codicils. *Hemming v. Gurrey (g)*; *Fraser v. Byng (h)*.

Sir *E. Sugden*, Mr. *Pepys*, Mr. *Jeremy* and Mr. *Rudall*, in support of the Report :

In this Case there is no conversion of the Real Estate out and out ; but there is, simply, a conversion for the Persons who take under the Will. If, however, there were a conversion out and out, the produce could not be disposed of by an unattested Codicil. The whole of it is exhausted by a Will duly attested.

(b) 1 Vez. 320. See 1 Sim.
& Stu. 292 ; note (d).

(c) 4 Ves. 802.

(d) 1 V. & B. 410. See
417.

(e) 5 Russ 35.

(f) 2 Cox. 35.

(g) 2 Sim. & Stu. 311.

The Decree was affirmed by
the House of Lords, i Bligh.
New Ser. 479.

(h) 1 Russ. & Mylne, 90.

Sheddon v. Goodrich (i); *Hooper v. Goodwin* (h);
Beckett v. Harden (l); *Ackroyd v. Smithson* (m).

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The Case of the *Attorney-general v. Ward* does not apply; for the Testamentary Paper creates new Legacies; it does not merely substitute one Legatee for another.

The VICE-CHANCELLOR:

5th November.

In this Case, the Testator by his Will (which has been declared to have been well proved), after disposing of a certain portion of his Freehold Estate, devised as follows: "And, as to all my other Freehold, Leasehold and Copyhold Messuages, Lands, Tenements, Hereditaments and Premises, with the Appurtenances, and all my Personal Estate and Effects whatsoever and wheresoever, I give, devise and bequeath the same unto my Friends, *John Strong* and *Richard Roberts*, their Heirs, Executors, Administrators and Assigns, upon Trust that they my said Trustees and their Heirs, do, with all convenient speed after my decease, sell all my Estates and Effects and convert the same into Money; then upon Trust to discharge all my just Debts and Funeral Expenses, together with all other Expenses; then upon Trust to apply all the remainder towards the Payment of my Legacies hereinafter by me given." And then he proceeds to give a variety of Legacies: and, at the end of the Will there are these words: "And I direct that my Trustees shall not be obliged to pay the Legacies till two years after my death, without the Property is sooner disposed of. If the

(i) 8 Ves. 481.

(l) 4 M. & S. 1.

(k) 18 Ves. 156.

(m) 1 Bro. C. C. 503.

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Legacies given should be found to exceed my Property, my Will is that a proportionate abatement shall take place on each Legacy that I have given: on the contrary, if it should exceed it, to have the like proportion added to each Legacy." The Testator then made a Codicil of the 9th of January 1805, which was unattested, and by that he gave some small pecuniary and several specific Legacies: he then made a Codicil of the 26th of June 1806, which was duly attested: subsequently he made what is called a Testamentary Paper, which was admitted to Probate by the Ecclesiastical Court, but which is, obviously, an incomplete instrument. At the foot of this Paper, the Testator wrote the following words: "These are the instructions given by *Richard Travers* to *Giles Russell* to make his Will by to-morrow morning." The Paper, however, contains nothing but what the heading of it denotes, namely, an account of the Testator's Relations, with various Sums set opposite to their names. This Paper, having been admitted to Probate, may operate upon the Testator's Personal Estate; and it has been contended that, inasmuch as a great number of Persons are named in it whose names are found in the Will and Codicils, the Legacies which are given by it were meant to be substitutional for the Legacies which are given by the Will and Codicils. But it is observable that, in many instances, the Legacies which are given by the Testamentary Paper, are not given to the same Persons as are named in the Will, but are given in words that may extend to other Persons than those who are entitled to take as Legatees in the Will, as, for instance, the words "Family, Children, Sisters," are sometimes used.

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If it were allowable to indulge in conjecture, one cannot but suppose that the Testator did intend to make a new Will; but it is obvious that this Paper is in so incomplete a state, that it cannot be taken as a Will. It appoints no Executors, and makes no disposition of the residue.

It appears that the Personal Estate has been exceedingly deficient, and the only Fund which remains to be divided, is a fund which has arisen from the Testator's Real Estates. Several Exceptions have been taken to the *Master's* Report, the general purport of which is that the *Master* has done wrong in finding that the Legacies given by the Testamentary Paper, are not substitutional, but cumulative Legacies. When, however, the Testamentary Paper is contrasted with the Will and Codicils, it does, I think, appear that I am not at liberty to say that the Legacies given by that Paper, were intended to be substitutions for the Legacies given by the preceding Instruments. In Cases where there have been slight variations only between the Legacies given by a Will, and those given by a subsequent Instrument, the Court has held that the latter were meant to be substitutions for the former. But, in this Case, there is a manifest difference between the Legacies given by the Will, and the Legacies given by the Testamentary Paper. In the first place, the Clause at the end of the Will, has the effect of making every Legatee who is named in it, take a further Sum of Money, in proportion to the amount of his Legacy, out of the clear residue of the Testator's Real and Personal Estate, provided it should be found more than sufficient to pay the Legacies. That Clause, however, is not found in the Testamentary Paper. In the next place,

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the Paper operates upon the Personal Estate only, but the Will operates upon the Freehold and Copyhold, as well as the Personal Estate. Again, in the Testamentary Paper, no time is expressed for the payment of the Legacies, and, consequently, they all would be payable at the end of one year after the Testator's death; whereas, by the Will, the Testator has directed that the Trustees shall not be obliged to pay the Legacies till two years after his death, without the Property is sooner disposed of. The Persons who are named to take as Legatees by the Testamentary Paper, cannot take their Legacies as charged upon the Freehold Estate; for the Testator has expressly directed that the Surplus of the whole Fund arising from the Sale of his Freehold and Copyhold and Personal Estate, which shall remain after the payment of his Debts and Legacies, and Funeral Expenses and other Expenses, shall be applied towards the payment of his Legacies thereafter by him given. If there could have been any doubt upon this point, the matter has been put at rest by the decision in the Case of *Bonner v. Bonner* (n); and also by the decision in *Hannis v. Packer* (o).

My opinion therefore is, without entering into the minute questions which are raised, as to a great number of these Legacies, by exceptions adapted to them severally, that there is no pretence for saying that the Legacies given by the Testamentary Paper, are substitutions for the Legacies given by the Will and Codicils. The consequence is, that the Exceptions must be overruled.

(n) 13 Ves. 379.

(o) Amb. 556.

HARRISON v. BOYDELL*.

1833 :
12th June.

Receiver.

A RECEIVER appointed in this Cause, was discharged by an Order of the 16th of February 1832. The *Master*, by his Certificate dated the 16th of April 1833, found the Balance due from the Receiver on the 16th of February 1832, (after allowing him 8 *l.* 7 *s.* 6 *d.* for his Salary) to be 139 *l.* 11 *s.* 5 *d.*; and, in pursuance of the General Order (a), the *Master* appointed the 7th of May 1833 for the payment of the Balance into Court.

A Receiver who had been discharged, did not pay in his Balance on the day fixed by the *Master*. Ordered that he should pay in the same, and also the amount allowed for his Salary, with Interest.

The Receiver not having paid in the Balance, a Motion was made that he might be ordered to pay in the same and also the amount allowed for his Salary, together with Interest, on both Sums, at Five per Cent., from the day appointed by the *Master*, and that he might also be ordered to pay the Costs of the Motion.

Mr. *Beames*, in support of the Motion, referred to the General Order, and to *Potts v. Leighton* (b), adding that the Court ought to follow the rule laid down for the guidance of the *Master*, who, in consequence of the Receiver having been discharged, could not act under the General Order.

Motion granted.

* *Ex Relatione* Mr. *Beames*.

(a) See Orders in Chancery; Ed. *Beames*, 461.

(b) 15 Ves. 273.

1833:
13th June.

*Infant
Guardian.*

Guardian appointed to an Infant entitled to Freehold Property worth 80*l.* a year, without a reference.

EX PARTE JACKSON.

ON a Petition by an Infant entitled to Freehold Property of the annual value of 80*l.* praying that his maternal Uncle might be appointed his Guardian, the *Vice-Chancellor* made the Order without a reference to the *Master (a)*.

Mr. *Blunt* appeared in support of the Petition.

(a) See *Ex Parte Wheeler*, 16 Ves. 266; *Ex Parte Janion*, 1 J. & W. 395; *In re Jones*, 1 Russ. 478; and see *Seton on Decrees*, 280.

1833:
17th June.

*Practice. -
New Orders.*

The Orders of the Court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from.

BURRELL v. NICHOLSON.

MOTION, by Plaintiff, that the time allowed by the 12th Order of 1828, for procuring the *Master's* Report as to the insufficiency of an Answer, might be extended.

The Motion was supported by an Affidavit stating that the Order of Reference was obtained on the 13th of

The time allowed by the 12th Order for procuring the Report as to the insufficiency of an Answer, extended, the drawing up of the Order having been delayed by the Offices being closed, and the Plaintiff having, through inadvertence, omitted to obtain the *Master's* Certificate that further time was necessary to enable him to make his Report.

May, that the Offices were then closed for the recess, and did not re-open until the 20th, when the Plaintiff got the Order drawn up and that the Plaintiff, through inadvertence, neglected to procure the *Master's* Certificate that further time was necessary to enable him to make a satisfactory Report.

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Mr. *Kindersley* for the Plaintiff.

Mr. *Pepys* and Mr. *Parker*, for the Defendant, said that the Order declared the Answer to be sufficient, and left no discretion in the Court.

The VICE-CHANCELLOR :

The Orders of the Court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from. Here the delay in drawing up the Order, was caused by the Offices being closed for the vacation, and the omission to procure the *Master's* Certificate that further time was necessary to enable him to make his Report, arose from inadvertence; and, therefore, I think that a fortnight's further time ought to be allowed, on the Plaintiff paying the Costs of this application.

1833:
21st June.

*Jurisdiction.
Injunction.
Lords of the
Treasury.*

Injunction granted to restrain the Lords of the Treasury from paying the Compensation awarded under 11th Geo. 4, and 1 Will. 4, c. 58, for the office of Side Clerk in the Exchequer, which had been abolished.

ELLIS v. EARL GREY.

THE Bill which was filed against the Lords of the Treasury, *John Watson Walmsley, R. Thomas* and Sir *Robert Laurie*, stated that, under an Indenture of Co-partnership dated the 23d of January 1823, *Ralph Ellis* the elder, the Plaintiff *John Ellis, Ralph Ellis* the younger, the Defendant *Walmsley*, and *Thomas Gorton* carried on the business of Attornies, Solicitors and Agents: that, during the Co-partnership, *Ralph Ellis* the elder, held the office of one of the Side Clerks on the Plea side of the Court of Exchequer: that, in 1827, *Ralph Ellis* the elder and *Ralph Ellis* the younger, agreed with the Plaintiff and with *Walmsley* and *Gorton* to retire from the Partnership, and the Plaintiff and *Walmsley* and *Gorton* agreed to form a new Partnership together; and that, by an Indenture dated the 24th of October 1827, and made between *Ralph Ellis* the elder, the Plaintiff, *Ralph Ellis* the younger, and *Walmsley* and *Gorton*, the then existing Partnership was dissolved, and the Goodwill of the Business was resigned by *R. Ellis* the elder and *R. Ellis* the younger, to and in favour of the Plaintiff and *Walmsley* and *Gorton* as Partners and for the purposes of the Partnership thereby established; and *Ralph Ellis* the elder covenanted with the Plaintiff and with *Walmsley* and *Gorton* their Executors and Administrators, that he would thenceforward stand possessed of the office of one of the Side Clerks of the Exchequer, in Trust for *Gorton*, and for the purposes and benefit of the Partnership by the now-stating Indenture agreed on,

while continuing, and that he would, when required by the Plaintiff and by *Walmsley* and *Gorton* or either of them, and at the expense of the new Partnership, procure *Gorton* to be appointed to the office in his place. And it was further agreed that, from and after the determination of the new Partnership, the office should be held in Trust for *Walmsley* and *Gorton* equally, for their joint lives, and, after the death of one of them, in Trust for the Survivor, or, while both should be living and after the Partnership should be expired or determined, either *Walmsley* or *Gorton* might require the office to be sold for their mutual and equal benefit: and the Plaintiff, and *Walmsley* and *Gorton* agreed with each other to become and continue Partners in the business of an Attorney, Solicitor and Agent, for the term of Ten Years from the 31st of August then last, in the Shares and upon the Terms mentioned in the Indenture.

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ELLIS
v.
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The Bill further stated that the Plaintiff was a sworn Clerk in the Court of Chancery when the new Partnership was formed, and, therefore, it was agreed that *Gorton* should be appointed to hold the office of Side Clerk in the Exchequer, in Trust for the new Partnership, until such office should be abolished, which was then expected to take place very shortly and before the term of the new Partnership would expire: that, soon after the commencement of the new Partnership, *Ralph Ellis* the elder surrendered up the office in the Exchequer, and *Gorton* was appointed thereto, and, on that occasion, 315*l.* was paid, as a Fee on admission to the office, out of the joint Funds of the new Partnership, and the Sum of Ten Guineas was also paid, in each year, out of the

1833.
 ————
 ELLIS
 v.
 EARL GREY.

joint Fund, (being the Fee paid to one of the sworn Attornies of the Court of Exchequer,) until the office was abolished, and the Fees and Emoluments of the office were received for the joint use of the Partnership: that, under a Proviso in the Deed of October 1827, *Gorton* was, on the 30th of January 1830, dismissed from the Partnership, and, shortly afterwards, was declared a Bankrupt, and the Defendant *Thomas* was chosen his Assignee: that the Plaintiff and the Defendant *Walmsley* continued to carry on the Partnership business, and, during the continuance thereof, and in July 1830, an Act of Parliament was passed, intituled: "An Act for Regulating the Receipt and future Appropriation of Fees and Emoluments receivable by Officers of the Superior Courts of Common Law" (a), and also an Act intituled: "An Act to Explain and Amend an Act for Regulating the Receipt and Future Appropriation of Fees and Emoluments receivable by Officers of the Superior Courts of Common Law" (b); and, by the first-mentioned Act, it was, amongst other things, enacted that, except as thereafter mentioned, every Person who, on the 24th of May 1830, should have held any office in or belonging to any of the said Courts, in Fee, or for any term either for life or years, or who should then have been appointed to any other office or employment in or belonging to any of the said Courts, by virtue of any right of appointment theretofore exercised by any of the Judges of His Majesty's Courts of Record at *Westminster*, should, forthwith after the passing of the Act, make out and render to the Commissioners appointed by the Act, an Account,

(a) 11 Geo. 4. and 1 Will. 4, c. 58, ss. 1, 5, 6, 16.

(b) 1 & 2 Will. 4, c. 35.

in writing, of the Fees or Emoluments of such office or employment as therein mentioned, and such Commissioners were to ascertain the gross and net Annual Value of the said Fees and Emoluments, and to certify the same, under their hands, to the Commissioners of His Majesty's Treasury for the time being: provided that, if any such office or employment as aforesaid, should be abolished by lawful authority, every Person who, under the provisions of the Act, would have been entitled to receive the difference between the net amount of the Fees and Emoluments which would have become due, and the certified value of such office or employment, in case the said office or employment were not abolished, should be entitled to receive, during all the time for which such Person was entitled to hold the office or employment so abolished, such Annual Sum as any three of the Commissioners of the Treasury for the time being, and the Lord Chief Justice or the Lord Chief Baron of the Court to which such office or employment might belong, should fix and appoint as a full and fair compensation for the loss of such office or employment.

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The Bill further stated that, by virtue of the said Acts of Parliament or one of them, the office of Side Clerk of the Exchequer was abolished; and that, on the said 24th of May 1830, *Gorton* held that office for the benefit of the Plaintiff and *Walmsley*, and the Compensation which thereupon was to be awarded in lieu of the Fees and Emoluments of the office, became Partnership Assets, and liable to be divided as such on the settling of the Partnership Accounts: that, on the abolition of the office, the account of the Fees and Emoluments required by the Act, was made out, at the ex-

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The Act of Parliament authorises the Lords of the Treasury merely to fix the Compensation to be made for the offices that may be abolished. It does not point out the Fund out of which the Compensation is to be paid; nor does it direct the Lords of the Treasury to pay it. But, assuming that the Lords of the Treasury are to pay the Compensation out of the Consolidated Fund, they are not amenable to this Court, so as to be directed to make a payment out of that Fund.

Handwritten: *Ellis v. The Earl of Grey*
10 2 B. 42

In *Oldham v. The Lords of the Treasury*, a Case in the Exchequer but which is not reported, the King, being entitled to receive a certain Sum out of the Consolidated Fund in respect of the Civil List, granted a Pension to a Party who assigned it. The Pension was, afterwards, revoked, and a new one was granted in lieu of it; and the Assignee filed a Bill against the Lords of the Treasury, to compel them to pay the new Pension to him. *Graham*, Baron, who delivered the Judgment of the Court, said: "This Bill proceeds on the ground of the fundamental jurisdiction of the Court over the Consolidated Fund; and the purpose of the Bill is to call on the Court to dispose of the Money which has been placed by Parliament at the disposal of the King himself. The jurisdiction of the Court of Exchequer extends only to the reaching the Monies which come into the Treasury, while they are in *transitu*: but, after Parliament has disposed of them and they have reached their destination, the jurisdiction of the Barons ceases; and here the King alone can order the payment of the Money. The Money is granted to the King, his Successors and Assigns; and the King himself must be sued by Petition of Right, if this Money is to be got at."

The 800 *l.* a year is the creature of the Act, and, under the Act, it is given to Mr. *Gorton*, who alone appeared to the Public to be entitled to it. The Plaintiff asks, by his Bill, that he may be paid a share of the Compensation, or that it may be declared to be Partnership Assets, and that the Lords of the Treasury may be directed to pay it into Court, to the credit of the Cause of *Ellis v. Walmsley*. But what have the Lords of the Treasury to do with this? They are merely the organs by which the Revenue of the country is to be disposed of, and, as being Public Officers, this Court can have no jurisdiction over them. *Priddy v. Rose* (c).

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Mr. *Kindersley* in support of the Bill:

The office of Side Clerk in the Exchequer, did not fall within the provisions of the 5 & 6 Edw. 6, c. 16, against the buying and selling of offices; therefore the dealing with it was not illegal (d).

We do not ask the Court to direct any payment to be made out of the Consolidated Fund. The 800 *l.* a year is an ascertained Sum which has been directed to be paid under the sanction of an Act of Parliament. There is no discretion to be exercised or responsibility to be incurred respecting the payment. The payment of a Pension granted by the Crown, depends, from year to year, on the pleasure of the Crown. The Act is a Public Act, and, therefore, it was not necessary to state all its provisions in the Bill. It is to be inferred, from

(c) 3 Mer. 86.

(d) See 3 Cruise's Dig. 160, *et seq.* in which the Cases which have arisen under this Act, are collected.

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those provisions, that the Lords of the Treasury are to make the payment: and, moreover, the Bill charges that they have paid, and intend to continue to pay it. It is not discretionary in the Lords of the Treasury either to make or to withhold the payment: they are not made Parties to the Bill as Public Functionaries, but as mere Stakeholders of the Fund; and, in that character there can be no objection to their being restrained from making the payment as they have hitherto done, until the rights of the opposing Claimants have been determined.

The Commissioners of Woods and Forests are Public Officers; and yet the Court, in a recent Case, granted an injunction against them (e).

The VICE-CHANCELLOR:

There is nothing stated in the Bill to show that the office of Side Clerk in the Exchequer is an office concerning the administration of justice, within the meaning of the Act of Edward 6, or that it is inconsistent with public policy that this Court should take notice of any dealings between individuals respecting such an office; and the Court is not at liberty to indulge in surmises as to the nature of the office.

It does not appear from those parts of the Act which are set forth in the Bill, nor is it plainly expressed in the Act itself, in what way the Lords of the Treasury are connected with the payment of the Sum in question; but I think it must be inferred that the Compensation

(e) See *Rankin v. Huskisson*, Ante, Vol. IV. p. 13. See also 3 Mer. 102.

Money is to be paid out of the Consolidated Fund, and that it is to pass through the hands of the Lords of the Treasury, who are to be mere ministerial conduit-pipes for payment of it to the Parties entitled. The Lords of the Treasury, therefore, are not, at all, in a different situation from the Governor and Company of the Bank of England, who are frequently prevented, by this Court, from transferring Stock or paying Dividends to the individuals who appear, on their Books, to be entitled to them. This Court has interfered with other Public Officers, as, for instance, the Commissioners of Woods and Forests in the Case alluded to, and the Commissioners under the Conventions with *France* for indemnifying *British* subjects for the confiscation of their Property by the *French* Revolutionary Government (f).

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I am of opinion that this Bill does not seek to interfere with any public duty which the Lords of the Treasury have to discharge, or with any discretion which they have to exercise in their public capacity. But it seeks to restrain them from doing a mere ministerial act, with a view to secure the Money for the Parties who may be decreed to be entitled to it.

Demurrer over-ruled.

(f) See *Hill v. Reardon*, Jacob's Rep. 34; and 2 Russ. 608.

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13th & 17th
June.

Covenant.
Charge on
Benefice.

A Vicar, whilst the 13 Elizabeth, c. 20, against charging Benefices, was repealed, charged his Living with an Annuity, and covenanted if he should exchange his Living, to secure the Annuity by charging and demising the new Living, and that, in the meantime, it should be charged with the Annuity. He afterwards exchanged his Living, but did not execute any Deed until after the revival of the 13 Elizabeth. Held that the Covenant was a subsisting charge on the new

Living, and a Receiver was appointed to provide for the Annuity.

METCALFE v. THE ARCHBISHOP OF YORK.

BY an Indenture of the 9th of August 1811, the Rev. *William Warrington*, the then Incumbent of the Vicarage of *St. Lawrence Jewry*, with the Rectory of *St. Mary Magdalen* in the City of *London* annexed, in consideration of 900 *l.*, granted an Annuity of 150 *l.* during his life, to *James Cottle*, charged, during his incumbency, on the Vicarage and Rectory; and, for better securing the Annuity, *Warrington* demised the Vicarage and Rectory to a Trustee for Ninety-nine years, if *Warrington* should so long live, and covenanted, with *Cottle*, for the payment of the Annuity, and, moreover, that in case he should, at any time or times thereafter, be preferred or promoted to any other Ecclesiastical Benefice or Benefices, in lieu of or in exchange for, or in addition to his then Vicarage and Rectory or his Church or Ecclesiastical Preferment for the time being, he would, at his own Costs and Charges, within three calendar months next after such events should happen, fully charge the same Benefice or Benefices with payment of the Annuity of 150 *l.*, and also demise the same to a Trustee of *Cottle's* nomination, in the same manner, in all respects, as the Vicarage and Rectory were thereby charged and demised for securing the Annuity; and that, in the mean time, the same Benefice and Benefices should be charged and chargeable with and liable to the payment of the Annuity of 150 *l.*; and, as a further security for the

affirmed 1 m & w. 547

4 m & w 580

Adopted v Marshall 2 D. F. & S. 598.

Annuity, *Warrington* executed a Warrant of Attorney, dated the same 9th of August 1811, on which a Judgment for 1,800 *l.* and Costs was shortly afterwards entered up and docketed, and Memorials of the Securities were duly enrolled in the Court of Chancery.

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By an Indenture of the 12th of January 1813, *Cottle*, in consideration of 800 *l.*, assigned the Annuity and all the remedies for recovering the same, to the Plaintiff, and it was declared that the Trustee should stand possessed of the Residue of the term of Ninety-nine years, in Trust for securing the punctual payment of the Annuity to the Plaintiff.

The Annuity being in arrear, the Plaintiff, in Michaelmas Term 1813, sequestered the Benefices under the Judgment. In November 1814, and whilst the Sequestration was in force, *Warrington* exchanged those Benefices for the Vicarage of *Leake*, in the North Riding of *Yorkshire*; and, by an Indenture of the 10th of November 1818*, after reciting the Deed of August 1811 and the Covenant for charging any Benefice to be taken in exchange, he, in pursuance of the Covenant, charged the Vicarage of *Leake* with the Annuity and the Arrears thereof, and empowered the Plaintiff to distrain upon it, in the same manner as if it had been originally charged with the Annuity, and he demised the Vicarage to a Trustee, for Ninety-nine years, for better securing the Annuity. A Memorial of this Indenture was enrolled in the Court of Chancery; and, on the 30th of November 1818, another Memorial of it

* It was alleged that the delay in procuring this Deed, was occasioned by *Warrington* being abroad.

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was registered in the North Riding of *Yorkshire*. In and after April 1815, the Plaintiff caused several Sequestrations to be issued, under the Judgment, against the Vicarage of *Leake*.

On the 9th of August 1832, *Warrington* executed a Warrant of Attorney, on which a Judgment was, on the following day, entered up against him at the suit of the Defendants *Meggison, Pringle & Manisty*, for 500 l. and Costs. That Judgment was docketed and registered in the North Riding of *Yorkshire*, and a Sequestration was issued under it against the Vicarage of *Leake*; and, on the 7th of November 1832, *Meggison, Pringle & Manisty* obtained a Rule of the Court of King's Bench, calling on the Plaintiff to show Cause why the Sequestrations issued by him should not be suspended, and their Sequestration be put in force as from the 10th of August then last, and why it should not be referred to the *Master* to ascertain what Sums the Plaintiff had levied under his Sequestrations, and, if he had levied more than 1,800 l. why he should not refund the Surplus, and pay to them the amount of their Debt and Costs, and cause satisfaction to be entered up on the Judgment obtained by *Cottle* against *Warrington*. Before the time for showing Cause had expired, the Bill was filed stating that, in April 1815 and at divers times since, the Plaintiff had caused divers Writs of *Sequestrari Facias* to be issued upon the first Judgment, for levying, out of the Vicarage of *Leake*, the Arrears of the Annuity which, from time to time, had become due, but that a large Sum still remained due to the Plaintiff in respect of the Monies to be levied by virtue of the several Writs, and in respect of the Annuity: that the Plaintiff was advised that, by reason of the first Judg-

ment not having been registered in the North Riding of *Yorkshire* previously to the registration of the second Judgment, the Plaintiff could not show Cause why the Rule should not be made absolute. The Bill charged that *Meggison, Pringle & Manisty* took their Security with notice of the Plaintiff's Annuity and of the Securities for the same; and that *Warrington* was in insolvent circumstances: and it prayed that the Annuity might be declared to be a valid Charge on the Vicarage of *Leake*, that an Account might be taken of the Arrears, that the Arrears and future Payments might be secured out of the Tithes and Profits of the Vicarage, that a Receiver might be appointed with directions, after providing for the Salaries of Curates, to apply the Surplus Profits in payment of the Annuity and the other incumbrances on the Vicarage, according to their priorities, and that the Archbishop of *York*, and *Meggison, Pringle & Manisty* might be restrained from granting, taking-out or proceeding in any Sequestrations against the Vicarage.

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Meggison, Pringle & Manisty, in their Answer, said they did not know, but, from information obtained at the time and in the manner after-mentioned, they believed that a Deed dated the 9th of August 1811, was made between the Parties mentioned in the Bill, and that, thereby, *Warrington* granted an Annuity of 150*l.* to *Cottle*; but, save as aforesaid, they were unable to set forth what was the purport of that Deed, save that they were informed as after-mentioned that *Warrington* had secured the Annuity by a Covenant to pay the same: that they did not know, but, from the information they had obtained at the time and in the manner after-mentioned, they believed that *Warrington* executed the

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Warrant of Attorney of the 9th of August 1811, and that the same was to the purport mentioned in the Bill; and they answered, in like manner, with respect to the Judgment entered up on the Warrant of Attorney, the Assignment of January 1813, the exchange of the Livings, and the Deed of November 1818; and they submitted that that Deed was invalid with reference to effecting any Charge on the Vicarage of *Leake*, and that the only valid Security which the Plaintiff had for his Annuity, was the Covenant for payment thereof contained in the Deed of August 1811. They then said that, in February 1832, they became *Warrington's* Solicitors in a Suit instituted by him relating to the Tithes of *Leake*, in which the Plaintiff was a Defendant, and, from the Papers which then came into their hands, they ascertained the several matters before-mentioned, and that the Plaintiff was in possession of the Vicarage under a Sequestration; but, on inquiring into the same, they learnt from *Warrington*, not only that the Sequestration and the Judgment had been satisfied, but that the Sequestration was illegal; for that the Plaintiff had levied not only the Arrears of the Annuity, but more than the amount for which the Judgment had been entered up, and that the Judgment had not been registered in the North Riding of *Yorkshire*, and the same was, therefore, void as against the Defendants, in respect to the Judgment obtained by them which had been duly registered: that, save as aforesaid, they had not, at the time when *Warrington* executed the Warrant of Attorney of August 1832, any notice of the Annuity or of the Securities for the same.

The Plaintiff now moved for an Injunction as prayed by the Bill.

Mr. *Knight* and Mr. *Metcalfe*, in support of the Motion :

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The Securities given for the Annuity were valid, inasmuch as they were executed after the passing of the 43 Geo. 3, c. 84, (which repealed the 13 Eliz. c. 20, against the charging of Benefices) and before the passing of the 57 Geo. 3, c. 99. *Doe v. Gully* (a). The Defendants, *Meggison & Co.*, as appears by their Answer, had notice of the Judgment and of all the other Securities for the Annuity. If the Court of King's Bench shall decide that the Judgment has been satisfied, then we rely on the Covenant to charge in the Deed of 1811.

(a) 9 Barn. & Cress. 344. The 13 Eliz. c. 20, s. 1, makes void all chargings of Benefices with Cure, with any Pension or any Profit out of the same to be yielded or taken, except Rents reserved on Leases to be made according to the Act. The 14 Eliz. c. 11, s. 15, recites that sundry evil-disposed Persons had defrauded the true meaning of the before-mentioned Act, by Bonds and Covenants of suffering other Persons to enjoy Livings and the Fruits thereof, for that such Bonds and Covenants were not, in Law, taken to be Leases, although they amounted to as much: and it enacts that all Bonds, Contracts, Promises and Covenants for suffering or permitting any Person to enjoy any Benefice with Cure, or to take Profits or Fruits thereof, other than such Bonds and Covenants as should be made for assurance of any Lease theretofore made, should be, to all intents and purposes, adjudged of such force and validity, and not otherwise, as Leases by the same Persons made of such Benefices.

Both the above Acts were repealed by 43 Geo. 3, c. 84, s. 10. But the 57 Geo. 3, c. 99, (which was passed in 1817) repealed so much of the Acts of Elizabeth as related to Spiritual Persons holding of Farms, and to Leases of Benefices and Livings, and to buying and selling, and to residence of Spiritual Persons on their Benefices, and the whole of the 43 Geo. 3, c. 84.

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That Covenant is, in this Court, tantamount to an actual Charge at Law. As soon as the Exchange was effected, *Warrington* became a Trustee of the new Living for the Plaintiff.

[The *Vice-Chancellor* :—The 43 Geo. 3, repealed the 13 Eliz. Then the 57 Geo. 3, repealed part of the 13 Eliz., and the whole of the 43 Geo. 3, and, therefore, it revived so much of the 13 Eliz. as it did not expressly repeal. The consequence is that that part of the 13 Eliz. which relates to the charging of Livings, is now the Law of the Land.]

Mr. *Pepys* and Mr. *Purvis* for the Defendants,
Meggison & Co. :

The Court of King's Bench decided, yesterday, that the Judgment for securing the Annuity, has been satisfied (b), and that *Meggison & Co.* are entitled to all the Sums which have been levied on the Vicarage since the 10th of August 1832. By the decision of the Court of Law, we are in possession of the Vicarage as Sequestrators; and the object of the present application is to restrain us from exercising our Legal right. If the Plaintiff has an Equitable Lien, the application is improper; he ought to have moved for a Receiver. The Covenant, however, was never intended to be a permanent Equitable Charge. The concluding words of it operated only until a Deed was executed: and, when the Deed of November 1818 was executed, the Covenant was performed. If the Covenant remained unperformed, this Court would not decree a Specific Performance: no Action could be maintained upon it; for the

(b) See *Cottle v. Warrington*, 5 Barn. & Adol. 447.

Law has declared the act for the non-performance of which the Jury would have to assess the Damages, to be illegal. *Doe v. Gully* has no application; for, in that Case, the Estate had gone out of the Clergyman before the revival of the 13 Eliz. The Bill is framed on the supposition that the Judgment required registration. The Court of King's Bench, however, has decided the contrary (c), and, therefore, there is nothing left in the Bill on which the Court can give relief.

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[The *Vice-Chancellor*:—I cannot say that I think so; for, if the Covenant in the Deed of August 1811, bound the newly-acquired Living until a Security should be given, as I think it did, and then a Deed was executed, which, by a subsequent alteration in the Law, was made a nullity, the Covenant would still remain in force. The doubt which I feel is whether, if the Plaintiff is entitled to take possession of the Living by virtue of the Covenant, this is the proper Motion to give him possession.]

Mr. *Knight*, in reply :

The Bill prays for a Receiver; and, as the Defendants appear, the Court can make an Order for a Receiver upon the present Motion. If a Party is in possession under two Titles, the one Legal and the other Equitable, and the Legal Title is impeached at Law, the Equitable Title ought not to be disturbed. At all events the Court will give the Plaintiff leave, either to amend his Notice of Motion, or to give a new Notice for a Receiver. The present Notice is dated the 22d April 1833, and it is owing to the state of the business of the Court that the Motion was not made

(c) See 5 Barn. & Adol. 452, 453.

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earlier. The Court of King's Bench did not decide the point of Law until yesterday. The Plaintiff was in possession at the date of the Notice, and he still is in bodily possession.

The VICE-CHANCELLOR :

The Court of King's Bench has held that the Plaintiff's Sequestration has been satisfied, and that the Defendants are entitled to possession of the Living as from the date of their Security ; and, therefore, strictly speaking, the Plaintiff is not in possession. His proper course would have been to move for a Receiver ; and I will allow him to give a Notice of Motion for that purpose.

17th June.

The Plaintiff having given a Notice of Motion for a Receiver, that Motion was now made by Mr. *Knight* and Mr. *Metcalf*.

Mr. *Pepys* and Mr. *Purvis*, for the Defendants :

The Plaintiff is now endeavouring to enforce his Lien, against our Judgment at Law. In order to give priority to a registered Deed over an unregistered one, actual Notice must be clearly proved, amounting to Fraud ; constructive notice is not sufficient. *Wyatt v. Barwell* (d). We admit Notice of the date of the Deed of August 1811 ; but we deny that we had any knowledge of that part of it by which the Equitable Lien was created.

The Court of King's Bench has decided that the Plaintiff has received, from his Sequestrator, more than the amount of his Judgment.

The VICE-CHANCELLOR :

In *Wyatt v. Barwell*, the Party had not notice of the Deed in question, but only of another Instrument which referred to it. In this Case however, it appears, by the Answer, that *Meggison & Co.* had distinct notice of the Deed of August 1811.

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It has been stated that the Court of King's Bench has decided that the Plaintiff has been overpaid on his Judgment, and that all the Sums which have been levied since the 10th of August 1832, ought to be paid over to *Meggison & Co.* But, notwithstanding that Decision, my opinion is that, if the Covenant in the Deed of 1811 operates upon the Living so as to make a prior Charge, (as I conceive it does,) although the Plaintiff has been overpaid on the Judgment, he is entitled to retain what he has received until it appears that he has been overpaid the Arrears of the Annuity. And, therefore, I shall make an Order, on the former Motion, to restrain the Defendants *Meggison & Co.* from further proceeding on the Rule at Law, and I shall also grant the Motion for a Receiver.

Meggison & Co. moved the Lord Chancellor (Lord Brougham) to discharge the above Order. But his Lordship affirmed the Order, with the exception of that part of it which restrained *Meggison & Co.* from proceeding on the Rule at Law.

1833 :
8th Nov. and
16th December.

In pursuance of the Lord Chancellor's Decision, the Plaintiff paid, to *Meggison & Co.*, 80*l.* in respect of the proceeds of the Living which accrued between

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the 10th of August 1832, and the appointment of the Receiver.

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The Plaintiff then filed a supplemental Bill, stating the proceedings which had taken place in the King's Bench and in Chancery since the filing of the original Bill, and the payment of the 80*l.*, and praying that *Meggison & Co.* might be declared Trustees, for the Plaintiff, of that Sum and of any other Sums which they might have received from the Living of *Leake*, and might pay over the same to the Plaintiff, and that the Receiver might be continued during *Warrington's* life.

1835 :
16th and 17th
March.

The original and supplemental Suits now came on to be heard.

Mr. Knight and *Mr. Metcalfe* for the Plaintiffs.

Mr. Jacob and *Mr. Purvis* for the Defendants
Meggison & Co. :

The Equities of the original and supplemental Bills are quite opposite to each other. The original Bill proceeded on the ground of the non-registration of the Plaintiff's Judgment, and on that ground only. By the supplemental Bill the Plaintiff seeks to enforce a Title as Equitable Mortgagee. But it is a settled rule that a Mortgagee, whether he be a Legal or an Equitable Mortgagee, cannot have an Account of by-gone Rents ; and the Plaintiff never set up his Title as an Equitable Mortgagee, until he applied for a Receiver. The Plaintiff now asks for a Receiver, not such as is granted on Motion, but for a Perpetual Receiver. He does not ask directly, for a specific performance of the Covenant to charge, because it is illegal and void ; but he asks

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for it indirectly. The Cases at Law have proceeded on the 13 Eliz. c. 20, only; because it was sufficient for the purpose of deciding those Cases, to look at that Act alone. But the 14 Eliz. c. 11, s. 14, goes further, and extends to all Contracts and Covenants for permitting any Person to enjoy any Benefice with Cure or to take the Profits or Fruits thereof. In *Brewster v. Kidgill* (e), Lord Holt says: "If a man covenant to do a thing which is lawful at the time of the making, and an Act come afterwards and make the thing covenanted to be done unlawful, such an Act is a repeal of the Covenant." In *Barker v. Hodgson* (f), Lord Ellenborough says: "If indeed the performance of this Covenant had been rendered unlawful by the Government of this Country, the Contract would have been dissolved on both sides, and this Defendant, inasmuch as he had been thus compelled to abandon his Contract, would have been excused for the non-performance of it, and not liable to Damages." Supposing that the Covenant would not be held to have been satisfied at Law by the execution of the Deed of November 1818, still no Action could be maintained upon it, as it has become illegal. How then is this Court to deal with it?

[The *Vice-Chancellor*:—The Living of *Leake* was acquired before the 13 Eliz. c. 20, was revived; and, in the Deed of August 1811, *Warrington* covenants that all future Livings shall be charged with the Annuity notwithstanding he may have done no act to charge them.]

A Court of Equity considers a Covenant as an Agree-

(e) 12 Mod. 166; see 6 Vin. Ab. 419, Covenant [R.]

(f) 3 M. & S. 267.

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if he did not choose to have a Charge, this Court would have protected him by its Decree. If the Covenant operated as an immediate Charge, the effect is the same as if a formal Charge had been made, which the subsequent Act could not set aside.

There can be no doubt that *Meggison, Pringle & Manisty* had notice of the Deed of August 1811 before they took their Security; and though, probably, neither they nor the Plaintiff were, at the time, fully aware of the Legal effect of that Deed, they must be taken to have had notice of it to all intents and purposes; and, therefore, the Plaintiff has now a right to have that Deed put in force. The consequence is that, as against those Gentlemen, the Plaintiff is entitled to be considered as the first Incumbrancer on the Vicarage of *Leake*. He was in possession under his Sequestration, and they applied to a Court of Law and turned him out of possession; but, as he was turned out of possession contrary to the effect of the Covenant, this Court will consider him as being in possession *ab initio*; for this Court will put Parties into the situation in which they ought to have been. The Money which the Defendants have received from the Plaintiff, must be paid back, and, if any Profits have been received under the second Sequestration, those Profits also must be paid over to him so far as to cover the Arrears of the Annuity; and, in order to provide for the future payments, the Receiver must be continued.

OLDAKER v. LAVENDER.

1833:
22d June.

Partnership.
Fraud.
Account.

ON the 12th of April 1823, Articles of Partnership were entered into by Messrs. *Oldaker, Lavender, Day & Murrell*, who, for some years before, had been Partners, as Bankers, at *Evesham* in *Worcestershire*, by which they agreed to continue in Partnership for 14 years from the date of the Articles, if they or any two of them should so long live; that, on the 1st of July then next, and on the 31st of December and 30th of June in every succeeding year, they would make up a just and true Account in writing, of all the Monies and Effects then due and owing or belonging to the Partnership, and of all Debts due and owing from the same, and would, thereupon, cause the true particulars of every such Account, and the Rest or Balance thereof to be entered in a Book to be kept for that purpose, and that each of the Partners should subscribe his name in the Book at the foot of every such Account, and, after every such Account should be so entered and subscribed, the heads of the same should be drawn out and written in four distinct Papers, each of which should contain the heads of such stated Accounts, and should be thereupon signed and subscribed by all the Partners, and one of such Papers should be delivered to each Partner; that, after the finishing and adjusting such Account as aforesaid, the clear Profits of the Partnership should be divided into four equal Shares, and one Share should be paid to each Partner; that if, at the time of making up such Accounts as aforesaid, any Debt due to the Part-

By Articles of Partnership it was agreed that just and true Accounts should be made out, half yearly, and signed by the Partners, and that such Accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the Partners. The Accounts were made out by one of the Partners; and, after the death of two of the other Partners, it was discovered that the Accounts were fraudulent. Held that the fourth Partner was entitled to have the Accounts of the Partnership taken from the date of the Articles.

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nership should, in the estimation of the Partners, be desperate or doubtful, a valuation should be put thereon, and the amount of such valuation be carried to the Joint Stock for the benefit of the then Copartners, and in case such Debt should afterwards produce more than the valuation, the overplus should belong to such of the Copartners as should be in the trade when the same should be received, and no part thereof should belong to any Partner or the representative of any Partner who should have died previous to the receipt of such overplus; that, *after such Accounts should be so from time to time made out and signed, the same should never afterwards be called in question on pretence of any error therein or otherwise*, unless some manifest error or mistake therein should appear, and *that in the lifetime of all the Partners and before the expiration of the Partnership*; that, in case any of the Partners should die before the expiration of the Partnership, the Survivors should pay to his Representatives his Share of the Rest or Balance upon the settling of Accounts up to the half-yearly day of account last preceding his death, in case the same should not have been previously received by him, but his Representatives should not be entitled to any Share of the Property or Produce of the Business subsequent to such last half-yearly day of account; that, in case any Debt due to the Partnership which, at the time of the last half-yearly settlement of Accounts previous to the secession or death of any Partner, should have been considered to be a good Debt, should, within six months after such settlement of Accounts, become bad or desperate, the seceding Partner, or the Representatives of the deceased Partner, should be subject to the loss that might happen thereby, in the same manner as if he had been living and

continued a Partner; and *Murrell* agreed with his Co-partners that he would, during the continuance of the Partnership, manage the Business and keep the necessary Books of Account, to the best of his knowledge, skill and ability.

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Murrell, who was the active Partner and Superintendent of the Books and Accounts and the Cashier of the Bank, made up and furnished to his Co-partners the half-yearly Accounts: but none of those Accounts, except that of the 1st of July 1823, were signed by *Lavender*, and the heads of the same were not drawn out and written on four distinct Papers and signed as directed by the Articles.

Lavender died in June 1829, and *Day* died on the 13th of February 1830.

Oldaker having become desirous that the Partnership should be put an end to, employed one of the Clerks in the Bank to investigate the Accounts; and it was then discovered that the half-yearly Accounts which had been made out by *Murrell*, were, in many respects, false and fictitious, and contained many fabricated items, and that he had applied the Funds of the Bank to his own use, to a very large amount. In consequence of this discovery, it was agreed that the Partnership should be dissolved, and that *Murrell* should assign his Share in the Partnership Estate and Effects to *Oldaker*, for the purpose of enabling the latter to wind up the affairs of the Partnership; and that Agreement was carried into effect by a Deed of the 16th of June 1830. Whilst *Oldaker* was proceeding to wind up the Partnership affairs, he discovered

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that, beyond the loss occasioned by *Murrell's* Frauds, there was a large Loss arising from bad Debts, including a Debt due from *Murrell* for Money lent to him by the Partnership, and from insufficient Securities taken by him, and also from Debts represented by him to be good, but which were either bad at the time, or afterwards proved so. By reason of these losses, the Assets of the Partnership were not nearly sufficient to discharge the demands upon it; and *Oldaker* advanced a large Sum, out of his own private Monies, in discharge of those demands. On the 2d of March 1831 *Oldaker* died.

The Bill was filed by *Oldaker's* Executors and Devises, against *Murrell* and the Executors and Devises of *Lavender* and *Day*, stating that *Murrell* was in Insolvent circumstances, and was wholly unable to satisfy the Debt due from him to the Partnership: that the Estates of *Lavender* and *Day* ought to bear a fair proportion of the Losses occasioned by *Murrell's* Frauds and Misapplications of the Partnership Effects, as also by bad Debts and insufficient Securities, or by any other causes, and that their Estates ought to be charged with a fair proportion of the Losses sustained up to the half-yearly day of settling Accounts preceding their respective deaths. The Bill charged that as none of the Balance Sheets, except the first, were made out and signed as directed by the Articles, the same were not binding on any of the Partners, and that those Balance Sheets were altogether fraudulent and void. And the Bill prayed a declaration to that effect, and that the Partnership Accounts might be taken from the date of the Articles; that *Murrell* might account for the Sums taken by him out of the Partnership; that the Losses

sustained from the date of the Articles, including the Funds misapplied by *Murrell*, might be ascertained, and that it might be declared that the Real and Personal Estates of *Lavender* and *Day* were liable to bear a due proportion of such Losses, and to reimburse *Oldaker's* Estate a due proportion of the Amount paid by him, out of his own Monies, in satisfaction of the Partnership Debts.

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The Defendants, the Executors and Devisees of *Lavender* and *Day*, stated, in their Answers, that their Testators entertained no doubt as to the fairness and accuracy of the Accounts made out by *Murrell*; and that, though those Accounts were not made out and signed as directed by the Articles, they were adopted by the Partners: and they submitted that the Accounts made out on the day of Settlement last preceding the deaths of their respective Testators, ought to be deemed settled Accounts and binding on all the then Partners and their Representatives; and they claimed the full benefit thereof as stated Accounts, in the same manner as if they had pleaded the same.

On the Cause being called on, the Defendant's Counsel objected to its being then heard, because a Daughter of one of the deceased Partners, who was made a Defendant as being entitled to a Share of her late Father's Real Estate, had made a Settlement of her Property and married, pending the Suit.

But the *Vice-Chancellor* said that the marriage of a Female Defendant was not an abatement of a Suit; that the Settlement had been made *pendente lite*, and that the Plaintiffs might, if they pleased, have the Cause heard

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and take a Decree, and then, if necessary, file a Supplemental Bill to bring the Husband and the other Parties to the Settlement before the Court.

The preliminary objection having been overruled,

Sir *E. Sugden*, Mr. *Knight* and Mr. *Lynch*, for the Plaintiffs, contended, first, that the Partnership Accounts had not been made out as required by the Articles; and, secondly, that it clearly appeared, from the provisions of the Articles, that the Parties did not mean to provide against wilful errors, or contemplate any Fraud to be committed by one Partner against the others.

Mr. *Rolfe* and Mr. *Jacob*, for the Defendants the Executors and Devisees of *Lavender* and *Day*:

The Articles stipulate that no Account shall be called in question, except for error discovered in the lifetime of all the Partners. How does it vary the case, as between the innocent Partners, that the error has been caused by Fraud? The guilty Partner, certainly, could not avail himself of that stipulation; but the other Copartners have been in error as amongst themselves; and, as two of them died before the error was discovered, the loss must be borne by the survivors. Suppose that the Debits of the Partnership had been stated too highly, could the Representatives of the deceased Partners have made any Claim an Account of such mis-statement? One of the provisions in the Articles is materially in favour of the surviving Partners: for, if one of the Partners had died on the 29th of June, the whole half-year's Profits would have belonged to the Survivors.

Next, as to the Accounts not having been made out

and signed as directed by the Articles. *Lavender* was the only one of the Partners who did not sign the Accounts; and, therefore, his Representatives are the only Persons who can complain that the Accounts were not binding on him. But they make no such complaint. The provision in the Articles as to the settlement of Accounts, was partly substantial, and partly directory. The substantial part was complied with; the form was waived by the Parties themselves. They substituted their own mode of Settlement for that pointed out by the Articles. By receiving their Shares of the Profits they adopted the Accounts; and it cannot now be said that they are not bound by them. *Pettyt v. Janeson (a)*; *Jackson v. Sedgwick (b)*.

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At all events, if the Estates of the deceased Partners are at all responsible for the Losses, the Plaintiffs are not entitled to have a general Account taken, as prayed by their Bill; they are only entitled to correct the Accounts so far as they are fraudulent.

Mr. *Stinton* appeared for the Defendant *Murrell*.

The VICE-CHANCELLOR:

The Stipulations in the Articles, as to the mode in which the Executors of a deceased Partner are to be dealt with, proceed on the supposition that the stipulation that just and true Accounts shall be made out, has been complied with. If, however, by reason of the Fraud of one of the Partners, just and true Accounts have not been made out, the ground on which the subsequent stipulations are founded, totally fails; and the

(a) Madd. & Geld. 146.

(b) 1 Swanst. 460.

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want of truth and justice in the Accounts, lays a foundation for taking a general Account.

Refer it to the *Master* to take an Account of the dealings and transactions of the Partnership, from the date of the Articles.

TAYLOR v. TAYLOR.

1833 :
25th June.

Will.

Construction.
Residuary Gift.

Testator, after directing all his Debts to be fully paid, devised his Real Estates to several different Persons, and charged certain of them with specific Sums. Held that those Estates, as well as the others, were charged with the Debts.

A Bequest of "All my Household Furniture, Implements of Trade, Cattle, Sheep, and all the rest and residue of my Monies, Securities for Money and Personal Estate whatsoever and wheresoever, not hereinbefore disposed of," is a Residuary Bequest.

WILLIAM TAYLOR, being seised of the Copyhold Estates mentioned in his Will, but of no other Real Estates, made his Will dated the 17th of July 1818, and which was partly as follows: "First I will and direct that all my just Debts and Funeral Expenses shall be fully paid and satisfied. I give and devise, unto my Son *William Taylor*, his Heirs and Assigns, all my Copyhold Messuage or Tenement, Closes, Lands, Hereditaments and Premises, situate in the Manor of *Balsal*, in the County of *Warwick*, and now in the occupation of myself and *John Ward*, To hold the said Messuage or Tenement, Closes, Land, Hereditaments and Premises, with their Appurtenances, unto my said Son *William Taylor*, his Heirs and Assigns for ever, subject nevertheless to, and I do hereby expressly charge the said Premises with the payment of 40*l.* a-piece to my Four Daughters, *Ann*, the wife of *Richard Butler*, *Mary*, the Wife of *John Hammond*, *Sarah*, the Wife of *John Ward*, and *Elizabeth*, the Wife of *John Boddington*." The Testator then devised three other Copyhold Estates, one to his Son, *Samuel Taylor* in Fee, another

In re Kendall's Trust 14 Bear. 610.
Powell v. Riley 12 Qz. 180

to his Wife, *Mary Taylor* for life, with remainder to his Sons, *Thomas* and *Abraham Taylor*, as Tenants in Common in Fee, and the third to his Son, *Joseph Taylor*, in Fee charged with the payment of the further Sum of 40 *l.* a-piece to his four Daughters; and he gave to them the further Sum of 40 *l.* a-piece, and directed the same to be paid out of his Personal Estate: and he gave to his Sons, *William* and *Samuel*, the Sum of 400 *l.* in Trust for his Wife for life, and, after his death, for his Sons, *Thomas* and *Abraham* on their attaining 21, but if they both died under that age, then in Trust for such of his other Children as should be then living. The Will then proceeded thus: "And as to all my *Household Furniture, Implements of Household, Implements of my Trade, Stock in Trade, Cattle, Sheep, Implements in Husbandry, and all the Rest and Residue of my Monies, Securities for Money, and Personal Estate whatsoever and wheresoever*, not hereinbefore by me disposed of, I give and bequeath the same and every part thereof, unto my said Wife and my said Sons, *Thomas Taylor* and *Abraham Taylor*, in equal Shares and Proportions; and I direct that the Share or Shares of both or either of my said two Sons who may be under the age of 21 years, shall be employed, by my Executors hereinafter named, for the benefit of such Son or Sons, during his or their minority, in such manner as my said Executors shall think proper." And the Testator appointed his Sons, *William* and *Samuel*, Executors of his Will. The Testator, by his first Codicil, dated the 12th of July 1822, reduced the Sums given to his Daughters to 30 *l.* each; and, by the second Codicil, dated the 21st of June 1823, he further reduced those Sums to 20 *l.* each; and he gave to his Son, *Samuel*, the Sum of 100 *l.*, which he directed should be paid out of the *Residue* of his Personal Estate.

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The Testator died in April 1826. The Bill was filed by *Thomas and Abraham Taylor*, the two younger Sons (the latter of whom was an Infant), and by *Mary Taylor* the Widow of the Testator, against the other Children, praying that the Will might be established and the Trusts performed.

At the hearing of the Cause two questions were raised; first, whether the Copyhold Estates were charged with the Testator's Debts and Funeral Expenses; and second, whether the Household Furniture and other Articles particularly mentioned in the Clause by which the Residue was disposed of, were specifically bequeathed, or not?

Sir. *E. Sugden* and Mr. *Jeremy*, for the Plaintiffs, contended, first, that, by the first Clause in the Will, all the Testator's Estates were charged with his Debts. *Bradford v. Foley* (a); *Webster v. Alsop* (b). Secondly, that the Clause in which the Residue was included, was partly specific and partly Residuary; for, if the Testator had intended it to be Residuary only, he would not have enumerated the Household Furniture and other Articles, or, if he had enumerated them, he would have added: "And all the Rest and Residue of my *other* Personal Estate. *Clarke v. Butler* (c).

Mr. *Wakefield* and Mr. *Harwood*, for the Defendants, contended, first, that the effect of the first Clause in the Will was controlled by the subsequent Charges; and that the Testator had pointed out the Estates which he

(a) 3 Bro. C. C. 351, note.

(c) 1 Mer. 304.

(b) Ibid.

intended to be charged, and the Charges to which they were to be subjected. *Willan v. Lancaster* (d); *Henvell v. Whitaker* (e). Secondly, that the Household Furniture and other Articles were not specifically given; for the Clause by which they were disposed of, comprised one Bequest only, and contained merely an enumeration of the particulars of which the Residue consisted.

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The VICE-CHANCELLOR:

The general charge of all the Debts upon all the Estates, is quite consistent with the charge of specific Sums upon the particular Estates; and, therefore, I consider it to be quite clear that all the Estates are charged with the Debts.

The next question is whether, by the words of the Residuary Clause, the Articles mentioned were specifically given, or whether that Clause contained merely an enumeration of the particulars of which the Residue consisted. This question is not decided by *Clarke v. Butler*. There the Gift was divided into two distinct sentences, and the Judgment as to all the things not connected with the Leasehold House, though given in a weak form, is supported by the Gift in the second Codicil. The language of this Will is different. Here there is no division of the sentence. The things specifically named cannot be separated from those given in general terms.

Then follows this Clause: "And I direct that the Share or Shares of both or either of my said two Sons who may be under the age of 21 years, shall be employed,

(d) 3 Russ. 108.

(e) Ibid. 343.

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by my Executors hereafter named, for the benefit of such Son or Sons, during his or their minority, in such manner as my said Executors shall think proper." Supposing the things mentioned to be specifically given, this would be a direction that the Executors should employ the Sons' Shares of those things, that is to say, of the Cattle, Farming Implements, &c. for the benefit of his Sons, which the Testator could not intend; but, if the Gift was Residuary, then the Executors would convert those Articles into Money, and the Testator might, with propriety, direct his Executors to employ the Shares of his Sons for their benefit.

My opinion, therefore, is that the Testator did not intend, by mentioning those Articles, to give them specifically, but that he meant merely to describe the Residue of which the Shares were given to his Sons.

LEWIS v. EDMUND.

1833:
26th June.

*Multifarious-
ness.*

THE Bill stated that the late Father of the Infant Plaintiffs, held, at his death, two small Farms, at the rack-rents of 20*l.* and Ten Guineas; that he died in February 1829, intestate, leaving his Widow, and the Infant Plaintiffs his only Children and Next of Kin; that the Widow possessed his Personal Estate, which consisted, principally, of Farming Stock and Furniture, and paid his Funeral Expenses and Debts; that she continued to occupy the Farms at the same Rents, and maintained and brought up the Infant Plaintiffs thereon; that she died in March 1832, having bequeathed all her Personal Estate to the Plaintiffs, *Lewis* and *Thomas*, in Trust to dispose of the same for the benefit of her Children, equally, in such manner as they should think best for their maintenance, education and establishment in life, and she appointed *Lewis* and *Thomas* her Executors in Trust and the Guardians of her Children; that they proved her Will, and let the Farms and sold the Stock, Furniture and Effects thereon, and, with the Proceeds and other Monies received by them as her Executors, they paid her Funeral and Testamentary Expenses and Debts, and

A. died Intestate leaving a Widow, and Infant Children his Next of Kin. The Widow, without taking out administration, possessed his Assets, paid his Debts, and died, having bequeathed her Personal Estate to the Children, and appointed *B. & C.* her Executors. *D.* then took out Administration to the Intestate and brought an Action, as Trustee for the Children, against *B. & C.* for Monies alleged to be due from the

Testatrix to the Intestate's Estate. *B. & C.* together with the Children, filed a Bill against *D.* praying for all proper Accounts of the Assets of the Intestate and Testatrix, possessed by *B.* and *C.*, and by *D.*, and of what, if anything, was due from the Testatrix's Estate to the Intestate's Estate, and for an Injunction to restrain the Action. Held that the Bill was not Multifarious.

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they invested part of the Surplus in the Purchase of Stock in their names, and had a Balance remaining in their hands; that the Defendant was an Uncle of the Infants, and, at the Testatrix's death he was a day labourer, and, being desirous of possessing himself of part of the Trust-monies, he, under pretence of benefiting the Infants, made certain proposals for the employment of those Monies, which the Executors declined; that the Executors had sent to a Solicitor employed by the Defendant, an account of their Receipts and Disbursements, and that no objection had been made thereto; that, in November 1832, the Defendant took out Administration to the Intestate, and, afterwards, applied to the Executors for payment of two-thirds of the Assets possessed by them, as belonging to the Intestate's Estate, and, subsequently, for payment of 120 *l.* for the purpose of stocking a Farm which the Defendant alleged had been taken for the Infants, but the Executors declined to pay the Sums demanded; that the Defendant, as Administrator, had brought two Actions against the Executors, one for the Rent of the Farms during the Testatrix's occupation, and for Money received by her after the death of the Intestate, and alleged to be his Property, and the other for the Proceeds of the Sale of the Stock and Furniture sold by the Executors, which was alleged to belong to the Intestate's Estate; that no Debts remained due from the Intestate's Estate, and that the Residue of his Estate, including what, if anything, might be due from the Testatrix, or might be recoverable in the Actions, *belonged to the Infants, and the Defendant professed to bring the Actions as a Trustee for them and for their benefit*; that the Plaintiffs, *Lewis and Thomas*, were willing to dispose of the Stock and Cash in their hands,

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as the Court should direct, and, in case any part thereof should appear to belong to the Intestate's Estate, the same ought to be secured for the benefit of the Infants; that the Defendant had been arrested for Debt, and had taken the benefit of the Insolvent Debtors' Act, and, if he should get possession of any part of the Trust-monies, he intended to apply the same to his own use. The Bill prayed that the Trust-monies in the hands of the Plaintiffs *Lewis* and *Thomas*, might be properly secured and applied for the benefit of the Infants; that all proper Accounts might be taken of the Estates of the Intestate and Testatrix, respectively, possessed by the Plaintiffs, *Lewis* and *Thomas*, and by the Defendant, and of their Debts, and Funeral and Testamentary Expenses, *and of what, if anything, was due from the Testatrix's Estate to the Intestate's Estate*, and that the Defendant might be restrained from taking any further proceedings in the Actions.

The Defendant demurred to the Bill because it was exhibited to have an Account taken of the Intestate's Estate possessed by the Defendant, and also of the Testatrix's Estate possessed by the Plaintiffs, *Lewis* and *Thomas*, which matters had no dependence on or connection with each other, and ought not to have been included in one Bill.

Mr. *Knight* and Mr. *Monro*, in support of the Demurrer, contended that the Accounts of the two Estates could not be joined in one Suit, as the Defendant had no interest in the Accounts of the Testatrix's Estate, nor had the Plaintiffs *Lewis* and *Thomas* any interest in the Accounts of the Intestate's Estate. *Harrison v.*

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Hogg (a); *Dunn v. Dunn* (b); *Maud v. Acklom* (c);
Marcos v. Pebrer (d).

Mr. *Knight* and Mr. *Jacob* appeared for the Plaintiffs.

But the VICE-CHANCELLOR, without hearing them, said: The Bill represents such circumstances as show that the Court cannot administer relief, without taking the accounts of both Estates.

The Mother and Children were the sole Next of Kin of the Father, and she was his Administratrix *de son tort*. She appoints the Plaintiffs *Lewis* and *Thomas* her Executors; and, after her death, the Defendant *Edmund* takes out Letters of Administration to her deceased Husband, and then brings Actions against the Representatives of the Widow, which, the Bill alleges, he professes to bring as Trustee for and for the benefit of the Infant Co-plaintiffs, who are entitled to the Personal Estate both of their Father and of their Mother. If the Defendant succeeds in these Actions, the effect will be that the Administrator of the Father will recover from the Executors of the Mother, who was the Administratrix *de son tort* of the Father. The Executors of the Mother have a right to have the Accounts taken of the Estate which they represent, and the Infant Plaintiffs have a right to file a Bill for the purpose of restraining the Defendant from proceeding in the Actions, to the fruits of which, it is alleged, they alone are entitled. The Defendant, by bringing the Actions, has implicated

(a) 2 Ves. J. 323.

(c) *Ante*, Vol. II. p. 331.

(b) *Ante*, Vol. II. p. 329.

(d) *Ante*, Vol. III. p. 466.

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The Testator died in 1823; and Mrs. *Gamble* died in 1832, without having made any appointment of the 6,000 *l.* Stock.

The Bill was filed by two of the Children of *Thomas Freeman* and *Nicola Sophia* his Wife, against *W. C. Freeman*, who was the only other Child, and also against the Executors of the Testator and the Children of the Plaintiffs, alleging that, on the death of Mrs. *Gamble* without having made any appointment with respect to the 6,000 *l.* Stock, the same became divisible between the Children of *T. Freeman* and *Nicola Sophia* his Wife in equal Third parts; but the Defendant *W. C. Freeman* alleged that Mrs. *Gamble* having made no appointment with respect to the Stock, the same was undisposed of after her Life-interest therein, and fell into the Residue; and the Defendants, the Children of the Plaintiffs, alleged that they took equal Shares in the Stock with the Plaintiffs. The Bill prayed that the Plaintiffs might be declared to be respectively entitled to one Third part of the Stock, and that the Executors might be decreed to pay the same accordingly.

Sir *E. Sugden* and Mr. *Barlow*, for the Plaintiffs, relied on *Montagu v. Nucella* (a).

Mr. *L. Lowndes* and Mr. *Winterbottom*, for the Defendants, the Children of the Plaintiffs, distinguished this Case from the Case cited, on the ground that, in this Case, a Power was given to Mrs. *Gamble*, under which she might have appointed a Share of the Fund to the Descendants of the Children; and, therefore, that

(a) 1 Russ. 165.

the Children and their descendants were entitled to the Fund equally. *Brown v. Higgs (b)*.

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The VICE-CHANCELLOR :

The descendants are mentioned merely as substitutes for the Children. There is a direct Gift, with a power of selection.

Declare that the Plaintiffs and the Defendant *W. C. Freeman*, are entitled to the Fund in equal Shares.

(b) 8 Ves. 561.

BROWN v. POCOCK.

1833:
6th July.

Will.
Construction.
Power.

LADY POCOCK, by her Will dated the 21st of July 1816, directed her Executors to pay Two Weekly Sums of 2*l.* each, to *John James Brown* and *James Edward Brown*, for their lives, and that 8,000 *l.* Three per Cents. should be set apart, and the Dividends applied for payment of those Weekly Sums; but, if either of the Legatees should attempt to assign, charge or incumber his Weekly Payment, the same should cease, and, upon each Weekly Payment ceasing, either for the causes before-mentioned or by the Legatee's

Testatrix gave a Weekly Sum to *A.* for his Life or until he should attempt to assign, &c. the same, and she directed a Sum of Stock to be set apart to answer the Payments; and she

gave to *A.* the power of leaving the Stock, after the Payments to him should cease, to and for the benefit of his Wife and Children, as he should, by Will duly executed, give and bequeath the same. *A.* died having made an invalid appointment of the Stock. Held that there was an implied Gift to his Wife and Children, in default of appointment.

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death, a Moiety of the Stock should be transferred to the Corporation for the Relief of Poor Widows and Children of Clergymen. The Testatrix, by a Codicil dated the 6th of July 1817, revoked the Gift of a Moiety of the 8,000 *l.* Stock, to the said Corporation, after the Weekly Payment to *James Edward Brown* should cease, and she gave to him the power of leaving that Moiety, after the payment to him should cease, to and for the benefit of his Wife and Children, in such manner as he should, by Will duly executed, give and bequeath the same.

The Testatrix died on the 6th of July 1818.

By the decree on Further Directions, it was ordered that the Amount of the Weekly Payments should be paid to the Legatees, out of the Dividends of 8,000 *l.* Three per Cents. which had been transferred into the Accountant-general's name.

James Edward Brown died in October 1832. He had Four Children living at the Testatrix's death (one of whom afterwards died) and Two Children born after the Testatrix's death: his Wife also was dead.

James Edward Brown having made an invalid appointment of a Moiety of the Stock, the question on the hearing of a Petition in the Cause, was to whom that Moiety now belonged.

Sir *E. Sugden* and Mr. *Cooper*, for the surviving Children of *James E. Brown*, contended that the Power given by the Codicil, was either a Power in nature of a

Trust, or a Power with an implied Bequest over to the objects of it, in default of Appointment. *Brown v. Higgs* (a); *Harding v. Glyn* (b); *Birch v. Wade* (c); *Davy v. Hooper* (d); *Maddison v. Andrew* (e); *Hockley v. Mawbey* (f); *Morgan v. Surman* (g); *Loungmore v. Broom* (h).

1833.
BROWN
v.
POCOCK.

Mr. *Pepys*, for the Executors of the Testatrix, contended that the Fund had fallen back into the Residue of her Estate.

Mr. *Monro*, for the Executors of *James Edward Brown*.

THE VICE-CHANCELLOR:

The Codicil contains no express Gift over in default of Appointment; but it is clear that the Testatrix intended the Wife and Children to take the Fund, and, therefore, I am of opinion that there is a Gift to them, by implication, subject to the Power.

Declare that the surviving Children of *James Edward Brown* are entitled to a Moiety of the Stock, as Joint-tenants.

(a) 8 Ves. 561.

(b) 1 Atk. 469.

(c) 3 V. & B. 198.

(d) 2 Vern. 665.

(e) 1 Vez. 58.

(f) 1 Ves. J. 143.

(g) 1 Taunt. 289.

(h) 7 Ves. 124.

1839:
23d July.

GIBBONS v. LANGDON.

Will.
Construction.
Portions.

Testator gave a Sum of Stock to his Wife for life, and, after her death, to his Sons and Daughter; and he directed the Interest of his Daughter's Share to be paid to her for her separate use, for life, and, at her decease, the Capital to be divided amongst such Children as she should have living

at his decease, the Shares of Sons to be *paid* at 21, and of Daughters at 21 or marriage, provided their Mother was then dead, otherwise, her Children's Shares were not to be *paid* to them until her decease: but if the Testator's Daughter had no Children living at her decease, her Share was to be equally divided amongst such of his Sons as should be then living: and if any of his said Sons and Daughter should die before his Wife, and without leaving Issue, their Shares were to be divided among his other Children. Held that the Daughter's Children living at the Testator's death, took *absolute* vested interests at 21, though their Mother was still living; and that her Interest in the Share of one of the Testator's Sons who died in the lifetime of his Widow, was not subject to the same Trusts as her original Share, but vested in her absolutely.

MOSES VERNON, by his Will dated the 25th of April 1799, bequeathed as follows: "I give and bequeath unto my Son *Joseph Vernon* and Mr. *John Cockran*, the Sum of 2,800 *l.* Three per Cent. Consolidated Bank Annuities, in Trust to pay unto my beloved Wife, *Ann Vernon*, the Interest, Dividends and Profits accruing therefrom, during her life; and, at her decease, the said Sum of 2,800 *l.* I desire may be divided, equally, Share and Share alike, between and among my Three Sons and my Daughter as follows, *Joseph Vernon*, *William Vernon*, *Henry Vernon* and *Maria Ann Vernon*, now *Maria Ann Smith*, the Wife of *James Smith*, but the Interest only of my said Daughter's Share is to be paid her, during her life, by my said Trustees, from time to time as it becomes due, and my said Daughter's Receipt alone, from time to time, shall be a sufficient and lawful discharge to my

See also Trusts & New Rep. 72

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said Trustees, notwithstanding her present or any other Coverture; and, at the decease of my said Daughter, my will is that her said Share shall be equally divided, Share and Share alike, between or among such Children lawfully begotten as she shall have living *at my decease*, or born within nine months after, such Children as are Sons are to be paid their Principal Money upon their attaining the age of 21 years, and such Children as are Daughters *are to be paid their Principal Money upon their attaining the age of 21 years* or day of marriage, respectively, whichever shall first happen, provided my said Daughter is then dead, otherwise, her Children's Share is not to be paid them until after my said Daughter's decease; but, if my said Daughter should happen to die before any of her Children shall have attained the age of 21 years, or, if any of them are Daughters, should have attained the age of 21 years or day of marriage respectively, whichever shall first happen, my Will is that my said Trustees shall apply the Interest towards such Children's education and maintenance, if only one Child, to that Child: *if my said Daughter has no Children living at her decease*, in that case, her Share is to be equally divided, Share and Share alike, between and among such of my said Sons as are then living or their Issue: but *if any of my said Sons and Daughter should happen to die before my said Wife, and without leaving any Issue, such Share or Shares is to be equally divided among my other Children*; but, if all my Children should die without Issue before my said Wife, in that case, the said Sum shall be paid to my Next of Kin, after my said Wife's decease, by my said Trustees or the Survivor of them and the Executors and Administrators of such Survivor."

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 GIBBONS
 v.
 LANGDON.

The Testator died in April 1800, leaving the several Persons named in his Will him surviving. *William Vernon*, one of the Sons, died in the lifetime of the Testator's Widow, an Infant, and without Issue. The Widow died in June 1823, leaving *Joseph* and *Henry Vernon*, and Mrs. *Smith* her surviving. The only Children of Mrs. *Smith* who were living at the Testator's death, were *Henry Smith* and *Maria Ann Smith*, who had long ago attained 21. In 1815, the daughter married *Thomas Hawley*, who died in 1828. In May 1832 Mrs. *Hawley* took the benefit of the Insolvent Debtors' Act, and the Plaintiff, who was her Assignee, conceiving that she was entitled to a Moiety of one Third of the 2,800 *l.* Stock, in Reversion expectant on the decease of her Mother, caused her Interest to be put up to Auction. It was described, in the Particulars of Sale, as "All the *vested* Right and Interest of the Insolvent, under the Will of her Grandfather, in and to the Sum of 933*l.* 6*s.* 8*d.* Three per Cent. Consolidated Bank Annuities, standing in the names of respectable Trustees, to a *Moiety* of which the Insolvent will be entitled on the demise of her Mother, a Lady aged 63 years." The Defendant, who was the Purchaser at the Auction, having refused to complete his Purchase on the ground that the Insolvent's Interest was misdescribed in the Particulars and that the Plaintiff could not make a good Title, the Bill was filed to compel a Specific Performance.

Sir *E. Sugden* and Mr. *Girdlestone* Junior, for the Plaintiff:

The Will gives the Property to the Testator's Widow for life, and, after her death, to the Sons and Daughter equally. The daughter being married, her Share is

given to her for her separate use during her life, and, after her death, it is to be equally divided between such Children as she should have living at the *Testator's* death; and such of them as are Sons are to be *paid* their Shares at 21, and such of them as are Daughters, at 21 or marriage, provided the Daughter should be then dead, otherwise her Children's Shares are not to be paid to them until her death. Provision is then made for the *maintenance* of the Children if the Daughter should die before any of them should attain 21, or, being Daughters, before they should attain that age or be married. Then follow these words: "If my said Daughter has no Children living at *her* decease, in that case, her Share is to be equally divided, Share and Share alike, between and among such of my Sons as are then living or their Issue." The Testator meant that, if his Daughter should die and leave no Child who should become entitled under the preceding Trusts, then her Share should go over; but, if a Child attained 21 (and Mrs. *Hawley* has long since attained that age), then it is not to go over.

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LANGDON.

The rule is, to presume that a Legatee is to have an absolute Interest at the time when he is to have a beneficial Interest. The Shares are to be *paid* at 21, and there is a Provision for Maintenance. The Court will mould the words of the Will so that, if a Child does take a Share, it shall not be deprived of it, if it dies in the lifetime of the Mother. *Schenck v. Legh* (a).

Mr. *Knight* and Mr. *Rogers*, for the Defendant:

A Title that is doubtful merely, is not to be forced

(a) 9 Ves. 300.

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LANGDON.

upon a Purchaser. *Jervoise v. The Duke of Northumberland* (b). The Testator directs the payment of the Shares of his Daughter's Children, in words which would not affect the vesting of them. He then goes on to say, "If my said Daughter has no Children living at her decease, &c." Can it be said that no two judicial minds can differ upon the Construction of this Will? If the Court is not prepared to say so, it cannot force the Title on the Purchaser.

There is another objection which, at all events, is unanswerable. It is assumed that Mrs. *Hawley* will, on her Mother's death, become entitled to a Moiety, of one Third of the 2,800*l.* Stock. That Fund is divisible into Thirds, in consequence of the death of *William Vernon*: but Mrs. *Hawley* takes no Interest in the Share which *William Vernon* would have been entitled to; for the accrued Share is not settled in the same way as the original Shares, but is vested, absolutely, in Mrs. *Smith* and the other surviving Children of the Testator.

Sir *Edward Sugden*, in reply:

The Testator intended the accruing Share to be held in the same way as the original Shares. He says that, if any of his Children should happen to die, their Shares shall be divided amongst his other Children. He meant that if any one of his Children should die, the Share of that Child should be withdrawn so as to increase the original Shares, and that it should go as part of the original Fund. The Testator has, in effect, said that if any one of his Children died, the Fund should be divided in Thirds.

(b) 1 Jac. & Walk. 559.

THE VICE-CHANCELLOR :

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LANGDON.

I do not entertain any doubt that, under the Words of this Will, Mrs. *Hawley* has an absolute, vested Interest in a Moiety of her Mother's *original* Share. The Direction that, at the decease of the Testator's Daughter, her Share shall be equally divided amongst such Children as she should have living at his decease or born within nine Months after, is so clear as not to admit of any doubt. The Testator next deals with the mode of applying the Shares which he had previously given. He directs that such of the Children as are Sons, are to be paid their Principal Money upon their attaining 21, and that such of them as are Daughters, are to be paid their Principal Money upon their attaining that age or day of marriage, provided his Daughter is then dead, otherwise, her Children's Shares are not to be paid them until after his Daughter's death. The words "her Children's Share," must mean the Share of the Children who are to take under the previous Gift. He then directs that, if his Daughter dies before any of her Children attain 21, or, if any of them are Daughters, before they attain that age or day of marriage, his Trustees shall apply the Interest towards *such Children's* Education and Maintenance. It is manifest that, here also, he means such Children as were to take under the prior description. Then the Bequest over is, merely, of that which was before given, in case the prior Legatees did not take : and, if there had been nothing more in this Case, I should have made a Decree that the Purchaser should take the Title.

The Testator, however, goes on to say : " But, if any of my said Sons and Daughter should happen to die

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before my said Wife, and without leaving any Issue, such Share or Shares is to be equally divided among my other Children ;” and there the matter rests ; so that the Share of *William Vernon*, who died in the lifetime of the Testator’s Widow, is, by express words, given to the surviving Sons and Daughter absolutely ; and it would be nothing but conjecture if I were to say that the Testator meant his Daughter to take her Share with the same Limitations over to her Children as her original Share was subject to.

I am of Opinion, therefore, that the second objection is well founded, and that a good Title cannot be made.

Bill dismissed.

1833 :
3d July.

NORTH v. MARTIN.

Deed.
Construction.

By a Marriage Settlement, Estates were limited to the Wife and the Husband, for their lives, with Remainder to the Heirs of the body of the

Husband on the body of the Wife, and their Heirs, and, if more Children than one, equally to be divided among them as Tenants in Common ; and, for default of such Issue, to the Wife and her Heirs. Held that the Husband did not take an Estate in Tail Special, but for life only, and that the Children took, by Purchase, as Tenants in Common in Fee in remainder.

BY an Indenture dated the 23d of November 1759, being the Settlement made previously to the marriage of *Mary Doughty* with *John Elwick*, after reciting the intended marriage, and that the Lady was seised in Fee and possessed of the Freehold, Copyhold and Leasehold Estates therein mentioned, it was witnessed that, in consideration thereof, and for settling a competent Jointure on *Mary Doughty* and making provision

Gimmo v. Howes 23 Rev. 189.

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MARTIN.

for her, out of her own Lands and Tenements, in case she survived her intended Husband, she conveyed the Freehold Estates to *T. Brooke* in Fee, to the use, after the marriage, of *J. Elwick* for life, with remainder to the use of *Brooke* and his Heirs, during the life of *Mary Doughty** in Trust to preserve the contingent Uses and Estates thereafter limited, but nevertheless to permit *J. Elwick* and his Assigns to receive the Rents during his life, with remainder to the use of *Mary Doughty*, for her life, for her Jointure and in lieu, with the Copyhold Lands, of her Thirds and Dower out of any part of the Real Estate of *J. Elwick*, and, after the decease of the Survivor of *J. Elwick* and *Mary Doughty*, to the use of *the Heirs of the body of J. Elwick on the body of Mary Doughty to be begotten and their Heirs, and, if more Children than one, equally to be divided among them*, to take as Tenants in Common and not Joint Tenants, and, *for default of such Issue*, and *Mary* should survive her intended Husband, to the use of *Mary* and her Heirs for ever, but, if she should die before *J. Elwick*, without Issue, then to the use of *J. Elwick* and his Heirs for ever, and with full power and authority for *Mary*, in such case, either by Will or Deed in writing, to charge all the before-mentioned Premises with the payment of 100 *l.* to such Person or Persons, in such manner and for such uses as she should direct and appoint: and *Mary Doughty* covenanted, with *Brooke*, to surrender the Copyhold Estates to such and the like uses, intents and purposes as were thereinbefore expressed concerning the Freehold Estates, and charged and chargeable, with the Freehold Estates, as the same were thereinbefore charged, and to be in further

* So in the Settlement.

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MARTIN.

part of her Jointure and in full of her Dower: and she assigned the Leasehold Estates to *Brooke*, in Trust for the uses before expressed of the Freehold and Copyhold Estates as far as the Law allowed, and also subject to the above charge with the Freehold and Copyhold Estates.

The marriage took effect; and *J. Elwick* survived his Wife, and died in 1810. There were Ten Children of the marriage, all of whom survived their Father.

The Bill alleged that the Children, on their Father's death, became entitled to vested Estates, in equal undivided parts, as Tenants in Common, of and in the Freehold, Copyhold and Leasehold Premises comprised in the Settlement, for absolute Estates therein according to the several qualities and tenures thereof, and that the Children were admitted to the Copyhold Premises: that the Shares of the Children in all the Estates, had been conveyed, surrendered and assigned to the Plaintiff; and the Plaintiff had lately contracted to sell the Estates to the Defendant, who refused to perform the Contract, alleging that the Children had no power, under the Settlement, to convey, surrender and assign the Estates, by reason that *John Elwick* and *Mary*, his Wife, took an Estate Tail therein, and that the same, upon the death of *J. Elwick*, vested in *John Elwick*, the eldest Son of the Marriage, as Tenant or Issue in Tail thereof, and, therefore, the Plaintiff was unable to make a good Title thereto. And the Bill prayed for a Specific Performance of the Contract.

The Defendant put in a general Demurrer.

The Parties having agreed that the question should be decided by the *Vice-Chancellor* :

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v.
MARTIN.

Mr. *Preston*, in support of the Demurrer, said that, by the Settlement, an Estate in Tail Special was created in favour of *John Elwick* the Father: that the general rule was that the words "Heirs of the body," were to be taken in their natural sense, unless there was something, in the context of the Settlement, which rendered it imperative on the Court to read them in some other sense. *Wright v. Jesson* (a). In that Case the word "Children" occurred. Here the general intent requires that the words "Heirs of the body" should be construed in their technical sense; for, if those words were to be taken to mean "Children," the birth of a Child would defeat the Limitations over to the Wife and Husband, and would prevent the Lady from making a Provision on a second marriage. If the Child were to die, the Estates would go the Heir of that Child *ex parte Paternâ*, to the exclusion of the Father and Mother: and, if there were more than one Child, there would be no cross Remainders between them. Moreover, in the Limitation over, the words, "for default of such Issue," are used.

There are various Cases in which there has been a Gift to Heirs of the body, with words of Limitation superadded, and, notwithstanding, the words "Heirs of the body," have been taken in their technical sense. *Franklyn v. Lay* (b); *King v. Burchell* (c); *Kinch v. Ward* (d); *Doe v. Harvey* (e).

(a) 2 Bligh, 1.

(d) 2 Sim. & Stu. 409.

(b) Ibid. 59, Note.

(e) 4 Barn. & Cress. 610.

(c) Amb. 379. S. C. 1 Eden, 424.

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Mr. O. Anderdon, in support of the Bill:

The construction of words in Marriage Settlements, is different from what it is in other instruments where the consideration of marriage does not occur. By holding that the Children take as Purchasers, it is put out of the Parent's power to defeat them. In *Wright v. Jesson*, no words of Limitation were engrafted on the words "Heirs of the body." There is no particular force in those words, where, as in this Case, words of explanation are added. *Hodgeson v. Bussey* (f); *Theebridge v. Kilburne* (g).

The VICE-CHANCELLOR:

Here there are all the elements of a Case, which would call upon the Court to decide that the first taker took an Estate in Tail Special. But then there are the words, "and if more Children than one," which must be taken to be interpretative of the words, "Heirs of the body." If those interpretative words had not been used, the Husband, notwithstanding the superadded words of Limitation, would have taken an Estate in Tail Special. But no Case has been cited, nor do I recollect any, in which the words, "Heirs of the body," have been held to create an Estate Tail, where those words of interpretation have been used.

If the interpretative words are to be allowed to operate, the effect of the argument founded on the Limitation over, "for default of such Issue," will be done away; for those latter words must be construed to mean, "for default of such Children."

(f) 2 Atk. 89.

(g) 2 Vez. 233.

Abraham v. North
6. Nov. 1835

The consequence is that the Demurrer must be overruled; and I shall declare that the Children of the marriage took, by Purchase, Estates in Fee, as Tenants in Common, in the Freeholds and Copyholds, and the absolute Interest in the Leaseholds (*h*).

(*h*) See Preston on Est. 359, *et seq.*

1833.

NORTH
v.
MARTIN.

PRENTICE v. MENSAL.

1833 :
8th July.

THIS Suit was instituted by the Infant Children of *W. Prentice*, deceased, to have an Account taken of his Personal Estate possessed by the Defendants, *Mensal* and *Vose*, his Executors.

Report.
Mistake.

The Defendants employed the same Solicitor to defend the Suit for them. In taking the Accounts directed by the Decree, certain payments were represented to have been made by *Vose*, separately; and the *Master*, in his Report dated the 12th of December 1831, gave *Vose* credit for such payments accordingly. On the 11th of January 1832, the Report was absolutely confirmed. In May 1832, *Vose* became Bankrupt. *Mensal* having discovered, on examining the Schedules to the Report, that certain payments which had been made by him and *Vose* jointly, were therein stated to have been made by *Vose* separately, presented a Petition pointing out the Errors in the Report, and stating that the Order for confirming it absolutely, had been made without his knowledge, and praying that that Order might be discharged, that it might be referred back to the

In taking Accounts directed by the Decree, certain Payments which had been made by *A.* and *B.* jointly, were represented and reported by the *Master* to have been made by *B.* separately. After the Report had been absolutely confirmed, and *B.* had become Bankrupt, the Court, on the Petition of *A.* discharged the Order to confirm the Report, and referred it back to the *Master* to review his Report.

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Master to re-take the Accounts, or to review his Report in respect of the particulars therein mentioned, and to make a further corrected Report.

Sir *E. Sugden* and Mr. *Wray*, in support of the Petition.

Mr. *Knight*, Mr. *Rolfe*, Mr. *Hetherington* and Mr. *Rogers*, *contrâ*.

The Executors put in their Examination, in 1830. In 1831, the *Master* made his Report, which *Mensal* permitted to be absolutely confirmed. So long as *Vose* was solvent, it was immaterial to *Mensal* in which form the payments were stated. In 1832 *Vose* became Bankrupt, and then the Report is objected to. The intervening Bankruptcy is a reason for not correcting the Errors. *Mensal* and *Vose* employed the same Solicitor; and *Mensal* may, if he pleases, bring an Action against the Solicitor. The Infant Plaintiffs ought not to suffer from *Vose's* Insolvency.

The *Vice-Chancellor* discharged the Order for confirming the Report, gave leave to *Mensal* to carry in objections to the Report, and referred it back to the *Master* to review his Report, and to carry on the Accounts directed by the Decree, from the foot of the Report; and ordered *Mensal* to pay the Costs of the Application and of the Order to confirm the Report, and the Costs of the Day.

THE ATTORNEY-GENERAL v. THE MAYOR
OF ROCHESTER.

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1833:
22d July.

Charity.
Decree.

BY the Will of *Richard Watts*, dated in 1579, and by an Indenture of the 26th of April, in the 35th year of Queen *Elizabeth*, Estates were vested in the Mayor and Corporation of *Rochester*, in Trust to apply the Rents in providing and maintaining an Almshouse within the City of *Rochester*, for Six Poor Travellers, being no common Rogues or Proctors, to lodge in, nightly, and also in providing Flax, Hemp, Yarn, Wool, and other necessary stuff, to set the Poor of the City and the Precincts and Limits thereof to work, according to the Purview of the Statute made, in the 18th year of the Reign of Queen *Elizabeth*, for setting the Poor to work, and the avoiding of Idleness, and for the further Relief of such as should be poor and impotent.

The Corporation of *Rochester* having, for several years, applied the Rents of the Estates, after providing

to participate in the Charity, and a Decree was made in 1680, directing that the Rents, should, for ever thereafter, be divided amongst the three Parishes in certain proportions. In 1808 an Information was filed on behalf of a fourth Parish, for a similar purpose; and that Parish was decreed to be entitled to a Share of the Rents, in the proportion of its extent and population to the extent and population of the three other Parishes; but the proportions, as between those Parishes, were not to be altered. An Information was afterwards filed on behalf of one of those three Parishes, claiming an increased Share of the Rents, on account of its population having increased more than the population of the other Parishes. But the Information was dismissed, the Decree of 1680 being final.

A Testator devised his Real Estates to Trustees, in Trust to dispose of the Rents for the benefit of the Poor of the City of R. and the Limits and Precincts thereof. The Trustees having applied the Rents for the benefit of the Poor of one only of the Parishes in the City, an Information was filed on behalf of two other Parishes, claiming

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for the Charity for Travellers, for the benefit of the Poor of the Parish of *St. Nicholas* only, within the City and Liberties, in 1673 an Information on behalf of the Poor of the Parishes of *St. Margaret* and *Strood*, was filed against the Corporation, for the purpose of having a Share of the Rents applied for the relief of the Poor residing in such parts of those Parishes as were situate within the Limits, Liberties or Precincts of the City: and, by a Decree made by Lord *Nottingham*, C. in 1676, it was declared that those parts of the two last-mentioned Parishes that were within the Limits, Liberties or Precincts of the City, ought to have a proportion as well of the Work as of the surplus Rents of the Estates, after providing for the Travellers' Charity, according to the then present Revenue and future improvement thereof; and certain Referees were appointed to set out such proportions*. The Referees, accordingly, by their Award dated in 1680, set out and allowed, to the Poor of *St. Margaret's* within the Liberties, Limits and Precincts of the City, for their Share of the Work and surplus Rents, 30*l.* a year, and six Thirtieth Parts of any future improvement of the Rents; and, to the Poor of *Strood* within the same Liberties, Limits and Precincts, 20*l.* a year, and four Thirtieth Parts of the future improvement of the Rents; and they set out and allowed, the remaining Twenty Parts, to the Corporation, to be employed by them for the relief of the Poor Travellers and of the Poor of *St. Nicholas*; and they directed that, in case of future diminution of the Rents, there should be a proportionate abatement out of the Shares allowed to *St. Margaret's* and *Strood*.

In 1680 the Award was confirmed, and it was ordered that the Poor of those parts of *St. Margaret's* and

* See Ca. Temp. Finch, 193.

Strood that were within the Limits, Liberties and Precincts of the City of *Rochester*, should, *for ever thereafter*, have a Share and Proportion, as well of the work as of the surplus Rents of the Charity Estates, according to the then Revenue thereof, and, thereafter, according to such improvement as should, at any time thereafter, be made thereof, *in such manner and proportion as by the Award was appointed.*

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GENERAL.

v.

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ROCHESTER.

In 1808, an Information was filed at the relation of the Parish Officers of *Chatham*, claiming to be entitled to participate in the Charity, on the ground that part of that Parish was within the Liberties and Precincts of *Rochester*. By a Decree made in 1810, by Sir *W. Grant*, M. R., it was referred to the *Master* to inquire whether any and what part of the Parish of *Chatham*, was within the City of *Rochester*, or the Liberties, Limits and Precincts thereof; and whether there were any other Parishes or parts of Parishes within the same, besides *Chatham*, *St. Nicholas's*, *St Margaret's* and *Strood*. The *Master* reported that a certain portion of the Parish of *Chatham* was within the Liberties, Limits and Precincts of *Rochester*, but that there were no other Parishes or parts of Parishes within the same besides *Chatham* and the three other Parishes. The Report having been confirmed, the Court declared, in 1812, that the Parish of *Chatham* was entitled, from the filing of the Information, to participate, in the Charities established by the Will and the Deed, with the City of *Rochester* and the other Parishes within that City and the Liberties, Limits and Precincts thereof, in the proportion that the extent and population of that part of the Parish of *Chatham* which was within the City and the Liberties, Limits and Precincts thereof,

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bore to the other Parishes or parts of Parishes also within the same: and it was referred to the *Master* to ascertain what proportion of the Rents of the Charity Estates ought to be applied for the benefit of *Chatham*; but, *in making such apportionment, the Master was to consider the Decree of 1676 and the Award, as ascertaining and establishing the proportions as between the Parishes of St. Margaret and Strood and the City of Rochester and St. Nicholas as between each other*; but this was to be *without prejudice to any application, on behalf of the City and the Inhabitants of either of the Parishes of St. Nicholas, St. Margaret and Strood, to vary such proportions.*

The *Master* having made his Report, the Court, in 1822, ordered the Rents to be divided into thirty-two parts, and two of such parts to be paid to *Chatham*, six to *St. Margaret's*, four to *Strood*, and the remainder to the Corporation, for the support of the Travellers' Charity and for the relief of the Poor of *St. Nicholas*.

When the Award was made, the Parish of *St. Nicholas* contained a larger population than *St. Margaret's*, but, since that time, the population of the latter had (as it was alleged) increased in a greater ratio than the population of any of the other Parishes, and the inhabitants of that part of it which is within the Liberties of the City, had become more numerous, by upwards of 2,000, than the inhabitants of *St. Nicholas*, whilst the expense of the Travellers' Charity had increased in a very trifling degree, and did not exceed 120 *l.* per annum.

The Rents of the Charity Estates having also greatly increased since the making of the Award, an Infor-

mation was filed in 1820, at the relation of the Parish Officers of *St. Margaret's*, praying that a new Apportionment of the Rents of the Charity Estates, might be made, and that a fixed annual Sum, or else a fixed proportion of the Rents might be allowed for the maintenance of the Travellers' Charity, and that the Residue might be divided among the Parishes of *St. Margaret*, *St. Nicholas*, *Strood* and *Chatham*, in proportion to the present population of *St. Nicholas*, and of such parts of the other Parishes as were within the Liberties of *Rochester*.

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 v.
 MAYOR OF
 ROCHESTER.

The *Attorney-general*, Mr. *Knight* and Mr. *Longley*, for the Relators :

All the Poor of the City of *Rochester* were the objects of the Founder's bounty. No Parish is mentioned either in the Will or in the Deed of the 35th of *Elizabeth*.

We do not ask anything that militates against the Decree of 1680. The Court, when it made that Decree, meant to make an equal distribution of the Rents amongst the Poor of *Rochester*. As the population of *St. Margaret's* has greatly increased, an unequal distribution will take place, if no alteration is made in the proportion of the Rents allotted to that Parish. Under the Decree of 1680, the Poor of *St. Margaret's* were entitled to six Thirtieth parts of the Rents ; but, by the Decree of 1822, their Share was reduced to six Thirty-second parts. Those two Decrees cannot stand together. The Decree of 1812 was made, expressly, without prejudice to any Application, on behalf of the City and the Inhabitants of any of the Parishes, to vary the Proportions.

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Sir *E. Sugden*, Mr. *Pepys* and Mr. *Ching*, for the
Mayor and Corporation :

Your *Honor* has no jurisdiction to alter the Decree of 1680. The time has elapsed within which a Decree of this Court can be altered. Why is not that Decree to be final, as it would have been if it had been made in a Suit between individuals? It contemplates and provides for an increase as well as a diminution of the Rents; and it expressly orders that the Poor of those parts of *St. Margaret's* and *Strood* that are within the Liberties of *Rochester*, shall, *for ever thereafter*, have a share of the Charity, according to the then Revenue thereof, and, thereafter, according to such improvement as should, at any time thereafter, be made thereof, *in such manner and proportion as by the Award was appointed*. The proportions in which the Rents were ordered, by the Decree of 1680, to be divided amongst the parishes of *St. Margaret's*, *St. Nicholas* and *Strood*, remained unaltered by the Decree of 1822.

The VICE-CHANCELLOR :

This is a very simple Case.

At the time when Lord *Nottingham's* Decree was made, it was not known that any Parish, except *St. Nicholas's*, *St. Margaret's* and *Strood*, was within the City and Liberties of *Rochester*; and it is clear, from the language of that Decree, that it was intended to bind the right as between those Parishes. After the great lapse of time since that Decree was pronounced, there is no authority in the Court of Chancery to alter it.

Sir *W. Grant*, when he made the Decree of 1810, did not infringe on the spirit of Lord *Nottingham's* Decree, but acted on it. He directed the *Master* to inquire whether any and what part of the Parish of *Chatham*, was within the City or Liberties of *Rockester*, and whether there were any other Parishes or parts of Parishes, within the City or Liberties. It is clear, therefore, he meant (consistently with what Lord *Nottingham* had decreed) if there were any such other Parishes or parts of Parishes, to allow them to participate in the benefits of the Charity. The *Master* having found that part of the Parish of *Chatham* was within the Liberties of the City, the *Master of the Rolls*, by the Decree of 1812, declared that the Parish of *Chatham* was entitled to participate in the Charity, in the proportion that the extent and population of that part of it which was within the Liberties of the City, bore to the other parishes. Sir *Wm. Grant*, therefore, merely declared what would have been declared by Lord *Nottingham* in 1876, if it had been known, at that time, that part of the Parish of *Chatham* was within the Liberties of the City: and all that his *Honor* did, was to direct the *Master* to ascertain what proportion of the Rents ought to be applied for the benefit of the Parish of *Chatham*, leaving the other Parishes to divide what was not taken from them, in the same proportions as they had before divided the whole. Consequently, the Decree of the *Master of Rolls* was in affirmance of Lord *Nottingham's* Decree.

It was not necessary for Sir *W. Grant* to decide whether there should be any variation in the proportions, with respect to the remaining Parishes. The inhabitants of *St. Margaret's*, however, carefully abstained from

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making any application to vary the proportions; and, in my opinion, no Judge in this Court had power to vary the proportions.

It must have been foreseen that the relative populations of the Parishes would vary; and therefore, Lord *Nottingham* declared, for the sake of convenience, that the proportions should, for ever thereafter remain as specified by the Award. *Summum Jus* would indeed be *summa injuria*, if, at the end of every five years, a fresh Information should be filed, and the *Master* be directed to compute the number of Paupers in each Parish.

I admit that, to a certain extent, the Testator's intention was violated by Lord *Nottingham's* Decree; but it has been long acted upon. What is now asked is to depart from the spirit of that Decree, and therefore this Information must be dismissed with Costs.

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TAYLOR v. TABRUM.

1833 :
24th July.

*Plaintiff.
Amendment.*

THE Testator in this Cause, devised a Mill and other Premises to the Defendants, *Hart* and *Tabrum*, in Trust to sell the same as soon as conveniently might be after his death.

The Testator died in 1818. At that time the Mill was let on a Lease (which expired at Michaelmas 1823), at the Rent of 400*l.* *per annum*. Soon after the Testator's death, the Trustees caused the Property to be put up to Auction, and 6,000*l.* were then bid for it; but it was not then sold, as one of the Parties interested in the proceeds of the Sale, desired that it might not be sold for less than 7,000*l.* A few days after the Auction, the Trustees were offered 6,600*l.* for the Property, but they declined the offer; and, in 1823 they sold it for 3,600*l.*

The Bill alleged that *Hart* had not acted in the execution of the Trusts of the Will, and prayed that *Tabrum* alone might be charged with the Loss arising on the Sale. *Hart* and *Tabrum* put in a joint Answer, admitting that they had jointly acted in the execution of the Trusts and in the Sale of the Mill and Premises.

A Bill was filed against two Trustees, alleging that one of them only had acted in the Trusts, and seeking to charge that Trustee only with a Breach of Trust. The Trustees, in their Answer, admitted that they had both acted in the Trusts. The Plaintiffs, however, did not amend their Bill. Held, that they were nevertheless entitled to charge both the Trustees with the Loss occasioned by the Breach of Trust.

Trustees. Costs.—Trustees, who were directed to sell an Estate as soon as conveniently might be after their Testator's death, refused, by the desire of one of the Parties interested, an offer of 6,600*l.* for the Estate; but they afterwards sold it for 3,600*l.* The Court charged them with the Loss, but gave them their Costs, as their conduct had not been wilful or perverse.

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The Plaintiffs, however, did not amend their Bill; and, on the hearing of the Cause, one question was whether they were entitled to charge *Hart* as well as *Tabrum* with the difference between 6,600*l.* and 3,600*l.*, notwithstanding the Bill remained unaltered.

The *Vice-Chancellor*, on the authority of *Attwood v. ———* (a), held that the Plaintiffs were entitled to charge *both* the Trustees with the difference, although it would have been more proper if they had amended their Bill.

With respect to the Costs of the Trustees, His Honor said that, though there had been some misconduct in the Trustees, it had not been wilful or perverse, and therefore, they ought to have their Costs (b).

Sir *E. Sugden* and Mr. *Wheatley* appeared for the Plaintiffs, and, Sir *C. Wetherell*, Mr. *Knight*, Mr. *Barber* and Mr. *Parker*, for the Defendants.

(a) 1 Russ. 353. 2. *1st* 391.

(b) See *Tebbs v. Carpenter*, 1 Madd. 290.

CAMPBELL v. HARDING.

1833:
30th July.

Practice.
Feme Covert.

ON this Cause coming on for Further Directions, a married Lady, who was entitled to some of the Funds in the Cause, attended to consent to waive her Equity to a Settlement; and it was said that her consent might be then taken, and the Order for payment of the Funds to her Husband, be made part of the Order on Further Directions, there being the usual Affidavit that no Settlement had been executed.

An Order for payment to the Husband, of Money to which his Wife is entitled, cannot be inserted in the Order on Further Directions, but must be obtained by Petition, although the Wife consents.

But the *Vice-Chancellor*, after consulting the Registrar, said that the Order for payment of the Funds to the Husband, could not be included in the Order on Further Directions, but must be obtained by Petition. His *Honor*, however, said that he would take the Lady's consent *de bene esse*.

1833:
27th, 29th &
30th July.

Public Policy.

A. the Proprietor of a Newspaper, prevailed on *B.* to make and deliver to the Stamp-office, an Affidavit that he, *B.*, was the Proprietor of the Paper.

B. afterwards agreed to sell the Paper to *D.* *A.* having become insolvent, his Assignees filed a Bill to set aside the Sale for Fraud. Held, that as *B.* had at *A.*'s instance, violated the 38 Geo. 3, c. 78, which requires the true Names of the Proprietors of Newspapers to be inserted in the Affidavit, his Assignees were not entitled to the Relief asked.

HARMER v. WESTMACOTT.

IN 1827, *W. D. Richards*, who was the original Proprietor of *The Age Newspaper*, being confined in the King's Bench Prison, and thinking it expedient that the name of the Proprietor should be changed, prevailed on *S. Bowden*, who was a journeyman printer on the Establishment, to allow himself to be represented to the Public as the Proprietor of the Paper, and to make and deliver an Affidavit to the same effect, to the Commissioners of Stamps (*a*). Afterwards *Bowden*, with *Richards's* privity, agreed to sell a Moiety of the Paper

(*a*) The 38 Geo. 3, c. 78, enacts, That no Person shall print or publish any Newspaper until an Affidavit or Affidavits made and signed as after-mentioned, shall be delivered to the Commissioners of Stamps, s. 1. That such Affidavit or Affidavits shall specify the real and true Names, Additions, Descriptions, and Places of Abode of all Persons who are intended to be the Printers and Publishers of the Newspaper, and of all the Proprietors of the same, if the number of such Proprietors, exclusive of the Printer and Publisher, does not exceed two: and in case the same shall exceed such number, then of two of such Proprietors, exclusive of the Printer and Publisher, and also the Amount of the proportional Shares of such Proprietors in the Property of the Newspaper, and likewise the true Description of the Building wherein such Paper is intended to be printed, and likewise the Title of such Paper, s. 2. That, where the number of such Proprietors exceeds two, the Names of two Proprietors, the Amount of each of whose proportional Shares in the Property of the Newspaper shall not be less than the proportional Share of any other Proprietor, shall be specified in such Affidavit or Affidavits, s. 3. That an Affidavit or Affidavits of the like import shall be made, signed and given in like

Ex p. Foss 2 July. V. J. 235.

to the Defendant *Westmacott*; and, subsequently, he agreed to sell the other Moiety to him.

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manner, as often as any of the Printers, Publishers or Proprietors shall be changed, or shall change their places of Abode or their Printing House, Place or Office, and as often as the Title of the Paper shall be changed, s. 4. That if any Person shall knowingly and wilfully print or publish, or sell or deliver out any Newspaper, such Affidavit or Affidavits not having been duly signed, sworn and delivered, such Person shall forfeit 100*l.*, s. 7. That if any Person making the Affidavit or Affidavits required by the Act, shall knowingly and wilfully insert therein the Name or Names, Addition or Additions, Place or Places of Abode of any Person as Proprietor, Printer or Publisher of any Newspaper, who is not a Proprietor, Printer or Publisher thereof, or shall omit to mention therein the Name or Names, Addition or Additions and Place or Places of Abode of any of the Proprietors, Printers or Publishers thereof, contrary to the true meaning of the Act, such Person shall be liable to the Pains and Penalties for wilful and corrupt Perjury, s. 8. That the Printer or Publisher shall deliver to the Commissioners of Stamps, to be kept by them, a Copy of every Newspaper printed or published by him, signed by him, with his Name and Place of Abode, under a Penalty of 100*l.*; and such Newspaper shall, on application made by any Person for that purpose, to the Commissioners, be produced in Evidence in any Proceeding civil or criminal, s. 17. That no Person other than a Commissioner or other Officer of the Stamp-office, shall supply any Person with Paper stamped for printing Newspapers, until the Persons supplying shall have given Security to deliver to the Commissioners an Account of the stamped Paper supplied, and to whom by Name; and that he will not supply the same to any Printer, Publisher or Proprietor, not having a Certificate signed by such Commissioners or Officer, purporting that the Security required by Law has been given by the Printer or Proprietor of the Newspaper, s. 26. That every Person concerned in the printing or publishing of Newspapers not duly stamped, shall be:

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Richards having taken the Benefit of the Insolvent Debtors' Act, the Bill in this Cause was filed by his Assignees, for the purpose of setting aside the Sales, on the ground that the first Sale was made fraudulently, and for an inadequate Consideration, and that the second was void, *Bowden* having no interest in the Paper, nor any authority from *Richards*, to enter into the Contract.

The principal ground of Defence was that *Richards* had suborned *Bowden* to commit Perjury, and, therefore, his Assignees were not entitled to the Relief asked.

Sir *E. Sugden* Mr. *Knight* and Mr. *Elderton*, for the Plaintiffs, said: First, that *Westmacott*, when he dealt with *Bowden*, knew that *Richards* was the Proprietor of the Paper and that *Bowden's* Affidavit was false, and, therefore, he was a Party to the Crime, and could not take advantage of it: Secondly, that *Bowden's* Name was used as a Trustee for *Richards*; that the Public had nothing to do with the beneficial Ownership of a Newspaper, as they were only concerned in having a Person who might be amenable to the Law for any slanderous or libellous Matter that might appear in the Publication.

a Debtor to His Majesty for the Sum which would have accrued if the same had been so stamped, s. 27. That if any Person shall file a Bill for the Discovery of any Persons concerned in the Property of, or as Printers, Editors or Publishers of any Newspaper, in order to enable him or them more effectually to bring or carry on any Suit or Action for Damages sustained by reason of any slanderous or libellous matter contained in such Newspaper, the Defendants shall not plead or demur to the Bill, but shall make the Discovery, s. 28.

[The *Vice-Chancellor* :—By what act or proceeding did *Bowden* become a Trustee for *Richards*? How did the property in the Newspaper pass from *Richards* to *Bowden*? Copyright cannot pass without an assignment by Deed.]

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This is a question of a Share in a Trade, and not of Copyright.

[The *Vice-Chancellor* :—You ask, by your Bill, that the Defendant may be declared a Trustee of the Copyright of the Newspaper.]

That is an inaccurate expression. The Property in the Paper passed, from *Richards*, to *Bowden*, by a verbal arrangement. The Provisions of the Act of Parliament were made for the benefit of the Revenue merely. It is not against Public Policy to hold that a Person, whose name does not appear at the Stamp-office, is interested in a Newspaper. If there are more than two Proprietors, the second Section requires the Names of two of them only to be specified in the Affidavit. The 28th Section, which compels Defendants to Bills of Discovery filed by Persons suing for Damages, to disclose the Names of all the Persons connected with the Newspaper, shows, beyond all doubt, that no question of Public Policy is involved, and that all the other provisions of the Act are mere fiscal regulations.

Richards was no party to the second Sale: that was a case of mere Fraud.

The *Attorney-general*, Mr. *Pepys* and Mr. *Bacon*,
for the Defendant :

It is a principle of great importance in the adminis-

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tration of Justice, to discourage Perjury and Subornation of Perjury. The Contract was a Contract between *Bowden* and *Westmacott*. *Richards* was present. He never told *Bowden* not to sell, or *Westmacott* not to buy; but he entered into an agreement with *Westmacott*, to supply certain articles for the Paper, for which *Westmacott* was to pay him three guineas a week. The Bill states that *Richards* was the Proprietor of the Paper; not a word is said about *Bowden* being a Trustee for him. The Provisions of the Act are not mere fiscal regulations. The object of the second Section is that the Public may know who are the Persons who have the greatest interest in the Paper. The 28th Section gives the Public a still greater benefit, by extending the remedy against all the Persons in any way connected with the Paper. If the requisites of the Act were not complied with, there is an end of the Plaintiff's Case.

Bowden committed Perjury at *Richards*'s instance. *Richards* took his own Affidavit off the files of the Stamp-office, to enable *Bowden* to put his Affidavit on the files. *Richards*, therefore, was guilty of Subornation or Perjury; and this Court will not grant to his Assignees the relief they ask. *Bensley v. Bignold* (b); *Marchant v. Evans* (c); *Stephens v. Robinson* (d).

Sir *E. Sugden*, in reply :

The Defendant's Counsel have endeavoured to construe the Act as if it deprived the Proprietor of his Property in the Newspaper. The Act does not destroy the Title of the Proprietor because his Name does not appear at

(b) 8 Taunt. 142.

(c) 5 Barn. & Ald. 335.

(d) 2 Crompt. & Jervis, 209.

the Stamp-office. No Act of Parliament can take away a Man's Property, except by express words. The Cases cited show that, if the Printer or Proprietor of a Newspaper omit to do something required by the Act, he cannot recover from a third Person; but there is no Case that decides that he cannot maintain his Title to the Newspaper itself. Penalties are imposed for omitting to do what the Act requires. The Act, therefore, provides its own Remedies, and this Court has no right to go beyond those Provisions. The concealment of the Proprietor's Name, cannot operate to any extent, as the Bill of Discovery will prevent it.

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In many cases, the Assignees may recover Property which a Bankrupt or an Insolvent cannot. Thus, in cases of fraudulent preference, the Assignees may call back the Property, though the Bankrupt himself cannot.

The VICE-CHANCELLOR, after observing on the Evidence in the Cause, and on the mode in which Property in a Newspaper might be acquired, proceeded thus :

The Policy of the Law having made it necessary that certain Acts should be done by the Printers and Publishers of Newspapers, the Act of the 38 Geo. 3, c. 78, was passed, which recites that it is expedient that Regulations should be provided touching Publications of the nature after-mentioned; and then it enacts, &c. [His Honor here read the Sections of the Act which had been referred to in the course of the Argument.] My Opinion is that these are not mere Fiscal Regulations, but that the object of the Legislature was to make it certain who the Persons are who publish matter

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that affects either the character of private individuals, or the security of the Government.

In this Case, at the time when *Westmacott* purchased, there were not two Persons interested in the Newspaper. Either *Bowden* or *Richards* was solely interested in it. If *Bowden* was a Trustee for *Richards*, there would have been but two Persons interested, and both their Names ought to have appeared in the Affidavit. That *Richards* was privy to *Bowden's* Acts, is indisputable. It is, plain, therefore, that they conspired together to do that which the Policy of the Law forbade; for they agreed to represent that *Bowden* was the sole Proprietor of the Paper: and that puts an end to the whole of the Plaintiff's Case; for no relief can be given, in a Court of Justice, to those who show that they thought proper to disappoint the Policy of the Law, and to do that which the Policy of the Law requires should not be done.

Bill dismissed with Costs.

DOBREE v. SCHRODER.

ON the 3d of November 1831, a ship called "The *Julie*," belonging to the Defendant *Schroder*, was run down and sunk by "The *Lord of the Isles*," a vessel belonging to the Plaintiffs. In Michaelmas Term 1832, the Defendant, *Schroder*, brought an Action against the Plaintiffs for 2,219*l.* 13*s.* 3*d.*, being 1,577*l.* 3*s.* 6*d.* for the value of The *Julie*, and of her Tackle, Apparel and Furniture; 596*l.* 18*s.* 11*d.* for the amount of her Freight, and 45*l.* 10*s.* 10*d.* for the value of her Stores and Provisions; and in February 1833 he obtained a Verdict for 2,200*l.* The Defendants, *Fruhling* and *Goschen*, who were the owners of the Cargo on board The *Julie* at the time of the Accident, also brought an Action, for the value of the Cargo, against the Plaintiffs, and recovered a Verdict for 8,568*l.*

1833:
25th & 31st
July, and
1st August.

Ship.
Construction of
53 G. 3, c. 159.

By the 53 G. 3, c. 159, the responsibility of Shipowners for damage done by their Ships to other Vessels, is limited to the value of the Ship doing the damage: held, that such Value must be ascertained as at the time of the accident.

In April 1833, the Bill in this Cause was filed under the 53d Geo. 3, c. 159,* (by which the responsibility of Shipowners for any Damage done, without their fault, to any other Vessel or her Cargo, is limited to the value of their Ship and the Freight for the Voyage in prosecution at the time of the accident,) stating that the value of The *Lord of the Isles* did not exceed 6,100*l.*, and that her Freight for the Voyage which was in prosecution at the happening of the damage, did not exceed 60*l.*, and praying that it might be declared that the Defendants, *Schroder*, *Fruhling* and *Goschen*, were not entitled to recover, in respect of the Damage sustained by them, more than the value of The *Lord of the Isles*, her Ap-

* See Sects. 1. 7. 8. 10.

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purtenances and Freight; that such value might be ascertained and distributed amongst the Defendants, according to their rights, or that the Vessel might be sold, and the proceeds, together with the value of the Freight, be distributed as aforesaid; and for an Injunction to restrain further proceedings in the Actions. On the 22d of April 1833, the Court granted the Injunction, and ordered the Plaintiffs to pay the 2,200*l.* and 60*l.* into Court, and referred it to the *Master* to approve of a proper Security for payment, by the Plaintiffs, pursuant to such Order as the Court should thereafter make, of such Sum as should be found to be the value of *The Lord of the Isles*, her Appurtenances and Freight, according to the provisions of the Act of Parliament, deducting the 2,200*l.* and 60*l.* from the amount of such Value.

The Defendants now moved for liberty to issue Execution, in their several Actions, for their Costs of such Actions; and that the 2,260*l.* might be paid out to the Defendant *Goschen*, and that the Plaintiffs might be ordered to pay to him 3,900*l.* (which was the difference between the 2,260*l.* and the 6,160*l.* the admitted value of *The Lord of the Isles* and her Freight, at the time of the accident; or that it might be referred to the *Master* to inquire and state what was the value of *The Lord of the Isles*, her Appurtenances and Freight, on the 3d of November, 1831, that being the day on which the Damage was done.

The Motion was supported by an Affidavit of the Defendant *Goschen*, stating that, at the time of the accident, *The Lord of the Isles* was nearly a new Ship, and was worth 11,000*l.* at the least, and that the Plain-

tiffs had insured her for 12,000 l. ; that, since November 1831, she had been employed in carrying Troops and Stores to Oporto, and, by the wear and tear of such employment, she had been reduced in value.

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Mr. *Pepys* and Mr. *Teed*, in support of the Motion, said that the Plaintiffs were protected, by the Act, from paying more than the value of their Ship and her Freight, but that they were not protected from the payment of the Costs of the Actions ; that the time to be looked at in ascertaining the value of the Ship, was the time when the damage was done ; *Wilson v. Dickson* (a) ; *Cannan v. Meaburn* (b) ; that, with respect to the Freight, the Legislature did look to a future time, because it was to be earned.

Mr. *Knight* and Mr. *James Russell*, for the Plaintiffs :

The Court has no authority but what the Act gives it. The 7th Section requires that the Plaintiffs, in their Affidavit to be annexed to the Bill, shall state that the Value of their Ship does not exceed a certain Sum ; and, in all the other Sections, the language is strictly present. In one instance, the words “ at the time of the accident ” are expressed. Why should it be inferred that that time was meant, when it is not expressed ? What is to prevent the Parties who have suffered the Damage, from making their claim at the time of the accident ? If they lie by, they cannot complain of any deterioration which has taken place, in the Value of the Ship, in the meantime. They suffered more than 12 months to elapse before they brought their Actions ;

(a) 2 Barn. & Ald. 2.

(b) 1 Bing. 465.

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and the delay is unaccounted for. With respect to the Cases that have been cited, it is enough to say that the question now before the Court, which depends on the 7th and 8th Sections of the Act, was not then raised. If the reference is to be as to the Value of the Ship at the time of the accident, there can be nothing paid either into or out of Court.

The next point is with respect to the course of Proceeding. The Defendants are Persons of whom we know nothing, except what they state before Answer. When the Answers are put in, it may, perhaps, appear that there are other Persons, besides the Parties who have brought the Actions, who are entitled to participate in the Value of the Ship. When a Fund is to be distributed amongst a class of Persons, the Court always directs an Inquiry to ascertain who are the Persons constituting that class. The 8th Section directs the Court, in case the Bill shall be dismissed after any Money shall have been paid into Court, to order the Money so paid in, to be paid to the Defendants. But the 10th Section authorizes the Court to distribute the Value of the Ship amongst the several Persons entitled thereto; therefore, it is premature to ask for anything, except to have the 3,900*l.* paid into Court.

The VICE-CHANCELLOR :

Upon the question of Costs, I entirely agree with the Defendant's Counsel. By the Act a benefit is given, to the Owners of Vessels doing damage to other Vessels, which avoids a multiplicity of Suits, and they have that benefit by proceedings in Equity; I think, therefore, that the Defendants have a right to their Costs at Law.

With respect to the questions as to the time at which the value of the Ship is to be taken, and to whom it is to be paid, I cannot but think that, in *Wilson v. Dickson*, the question as to the Value was not brought to the attention of the Court; but I am satisfied, on the construction of the Act, that the Value of the Ship is to be the Value at the time of the accident; and that the Legislature meant to provide for those Claimants who do, in fact, bring Actions. I shall, therefore, make an Order according to the Notice of Motion, except that the 3,900*l.* must first be paid in, and then paid out of Court.

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v.
SCHRODER.

SWINDELL v. SWINDELL.

THE Sheriff had taken the Defendant under an Attachment for want of Answer; but, at the request of the Plaintiff's Agent, had discharged him out of Custody, on his paying the Sheriff 40*l.*, which was to be returned on the Answer being filed.

The Answer not having been put in, Mr. Coleridge now moved for a Messenger to take the Defendant.

The *Vice-Chancellor*, after consulting the Registrar, refused the Motion, saying that, if a Defendant is in the Sheriff's custody, a *Habeas Corpus* goes; if Bail has been taken, then a Messenger is ordered to bring up the Defendant; but, in this case, the Defendant was neither in Custody nor out on Bail.

1833:
1st August.

Practice.
Process.

The Defendant had been taken under an Attachment for want of Answer, but, on his paying the Sheriff 40*l.* to be repaid on putting in his Answer, the Sheriff at the request of the Plaintiff's Agent, discharged him. Motion for a Messenger to take the Defendant who had not put in his Answer, refused.

1833 :
2d August.

LAWRENCE v. HALLIDAY.

Opening Bid-
dings.

MOTION to open Biddings on an advance of 300 £
on 5,030 l.

Biddings
opened on an
advance of
300 l. on 5,030 l.

Mr. Knight and Mr. Hayter for the Motion.

Mr. Rolfe and Mr. Stinton *contra* cited *Garstone v.*

Edwards. (a)

Cochrane v. Cochrane
2. R & M 674 The Vice-Chancellor made the Order.
Hobart v. Lygatt
2. Coll. 537.

(a) 1 Sim. & Stu. 20.

1833 ;
3d August.

WILLIAMS v. TOWNSHEND.

Practice.
Subpœna.
Attachment.

THE Defendant, *Mary Harrison*, had been taken on
an Attachment for want of appearance ; but, before the
Plaintiff took Proceedings to get an Appearance entered
for her, with a view to the Bill being taken *pro con-*
fesso, she was discharged from the Attachment under
11 Geo. 4, and 1 Will. 4, c. 36.

A Defendant,
who had been
taken on an
Attachment for
want of appear-
ance, was dis-
charged, under
11 Geo. 4, and
1 Will. 4, c. 36,
before Plaintiff
got an Appear-
ance entered for her. Held that, though a fresh *subpœna* might
be issued against the Defendant, no Attachment could be taken
out upon it. 5. Bear 398

Mr. Spence, for the Plaintiff, then moved for liberty
to issue a fresh *subpœna* against the Defendant. But
The Vice-Chancellor, doubting whether, if a fresh *sub-*

gotten an Appearance entered for her. Held that, though a fresh *subpœna* might
be issued against the Defendant, no Attachment could be taken
out upon it. 5. Bear 398

2d. Notes - Underwood. 7. Rem. 77.

pæna were issued, an Attachment could be taken out upon it, desired a Certificate to be obtained, from the Clerks in Court, upon the point.

The Certificate was as follows: "The Clerks in Court are of opinion that, although a new *subpæna* may be issued, yet, as the former Attachment was regularly enforced, a new Attachment cannot be issued: and, as the Defendant has not appeared to the Bill, it may be dismissed against that Defendant, without Costs, and a supplemental Bill in the nature of an original Bill, filed against her."

Mr. *Spence*, accordingly, now moved to dismiss the Bill; which was ordered.

1833.
WILLIAMS
v.
TOWNSHEND.

MARTIN v. WRIGHT.

1833:
9th August.

IN 1821, the Plaintiff, a celebrated Artist, invented and painted from Sketches which he had designed, a Picture called *Belshazzar's Feast*; which he shortly afterwards sold. In 1826, he engraved and published, from the Sketches, a Print of the same name, having previously done all necessary acts for securing to himself the Copyright of the Print (*a*). The Defendant, having purchased one of the Prints, had it copied on Canvass, in Colours, on a very large scale, and with Dioramic effect; and, he publicly exhibited such Dioramic Copy at the *Queen's Bazaar* in *Oxford-street*, for Money, and described it,

Prints and Engravings.
Copyright.

A. made a Copy of a Print invented by B., in colours, and of larger dimensions, and exhibited it as a Diorama. The Court refused to restrain the Exhibition, until the Right had been established at Law.

(*a*) See *ante*, Vol. V. page 399, note (*c*), where the Acts of Parliament by which the Property in Prints is secured to the Inventors, are collected.

Emperor of Austria v. Hossath 3 D. P. & J. 227.
Bradbury v. Hotten 8 Ex. 3
Prudential Ins. Co. v. Scott L.R. 10 Q.B. 142

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MARTIN
v.
WRIGHT.

in his Handbills and Advertisements, as “ Mr. *Martin’s* Grand Picture of Belshazzar’s Feast, painted with Dioramic effect.” The sale of the Plaintiff’s Print having been injured, as he alleged, by the Exhibition, the Bill was filed, stating as above, and praying that the Defendant might be restrained from further exhibiting the Dioramic Copy, and from representing to the Public that it was the production of the Plaintiff; and that the Defendant might account for and pay to the Plaintiff the Profits he had made by the Exhibition.

Mr. *Knight* and Mr. *Chandless*, in support of the Motion, relied, principally, on the 17 Geo. 3, c. 57, by which all Persons who, in any manner, Copy any Print, in the whole or in part, by varying or adding to the main Design, are subjected to an Action for Damages. They said that there was no difference between selling a Copy of a Print, and exhibiting it for money; as, in both cases, Profit was made of that which was appropriated to another.

Mr. *Pepys* and Mr. *Keene* appeared for the Defendant, but

The VICE-CHANCELLOR, without hearing them, said : Any person may copy and publish the whole of a Literary Composition, provided he writes Notes upon it, so as to present it to the Public, connected with matter of his own. Here the Defendant is alleged to have made a Copy of the Plaintiff’s Print, in Oil Colours and of dimensions different from the Plaintiff’s Print, not to sell, but to exhibit, in a fixed place, and in a given manner, so as to produce an Optical illusion. Exhibiting for Profit is, in no way, analogous to selling a Copy of the Plaintiff’s Print, but is dealing with it in a very different manner.

1833.

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v.
WRIGHT.

The 8 Geo. 2, c. 13, directed, in general terms, that any Person who should invent and engrave any Historical or other Print or Prints, should have the sole Right and Liberty of printing and re-printing the same for the term of 14 years, and protected that Right by Penalties. The 7 Geo. 3, c. 38, extended the protection of the former Act, no otherwise than to things not before enumerated, and for the term of 28 years. The 17 Geo. 3, c. 57, gave a Remedy by Action on the Case, which had not been given by the former Acts.

It appears to me that that Act never was intended to apply to a Case where there was no intention to print, sell or publish, but to exhibit in a certain manner; and, therefore, I ought not to grant the Injunction until the Right has been established at Law.

Then, with respect to the Defendant representing his Copy, as *Martin's* Picture. It must be either better or worse: if it is better, *Martin* has the benefit of it; if worse, then the misrepresentation is only a sort of Libel, and this Court will not prevent the publication of a Libel.

If *Martin* had exhibited his Picture as a Diorama, then he might have been entitled to an Injunction (b).

(b) See *Page v. Townsend*, ante, Vol. V. p. 395.

1833:
8th & 9th
August.

*Debtor and
Creditor.
Bankrupt.*

C. brought an Action against F. in the Lord Mayor's Court, for the recovery of a Debt, and issued an Attachment against B., who had in his hands Funds belonging to F. W. filed a Bill against C. B. and F., claiming a Lien on the Funds, and obtained an Injunction *ex parte* to restrain proceedings in the Action. Whilst the Injunction was in force, F. became Bankrupt: held that though C. might, but for the Injunction, have sued out Execution long before F. became Bankrupt, yet he was not entitled to be paid otherwise than rateably with the other Creditors.

ULLOCK v. BARBER.

R. J. FAYRER, the Captain of an *East India* Ship, being indebted to the Plaintiffs, on account of the proceeds of some Wines which he had sold in *India* on their account, and being about to sail again for *India*, was requested by the Plaintiffs to direct his Agents, *Barber, Neate & Co.*, of *Clement's-lane, London*, to pay over to the Plaintiffs all Remittances that might be made to them on account of the Wines. Accordingly, *Fayrer*, on the 27th of July 1829, sent a Letter to *Barber, Neate & Co.*, desiring them to pay over, to the Plaintiffs, the amount of the Proceeds of the Wines, out of any Remittances which should be received by them, from *M. Petrie*, his Agent in *India*. On the receipt of this Letter, *Barber, Neate & Co.* informed the Plaintiffs that they had not then received any Remittances from *Petrie*; but they undertook and agreed, (as it was alleged,) to pay, to the Plaintiffs, the Sum due to them, out of such Remittances when received. In 1830, *Petrie* remitted to *Barber, Neate & Co.* 1,500*l.* on the Plaintiff's account.

Fayrer being indebted, on Bond, to *A. Colvin*, in 1,500*l.*, and *Colvin* having learnt that *Barber, Neate & Co.* had in their hands the 1,500*l.* belonging to *Fayrer*, in November 1830 brought an Action against *Fayrer* in the Lord Mayor's Court, and issued a Foreign

Attachment against *Barber, Neate & Co.*, in respect of the Money in their hands belonging to *Fayrer*. The Action was set down for Trial on the 31st of May 1831.

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ULLOCK
v.
BARBER.

On the 28th of that month the Bill was filed, praying that the Plaintiffs might be paid what was due to them from *Fayrer*, out of the 1,500*l.* remitted to *Barber, Neate & Co.*; and that the latter might be restrained from parting with the 1,500*l.*, *except under the Order and Decree of the Court*, and that *Colvin* might be restrained from proceeding upon the Attachment, and from, in any manner, prosecuting the Action. *On the same day* the Injunction was *obtained ex parte*, and *Colvin* having been served with Notice of it, *the Trial* of the Action was stayed. The 1,500*l.* was afterwards brought into Court. On the 17th of November 1831, and whilst the Injunction remained in force, a Commission issued against *Fayrer*, under which he was declared a Bankrupt. A Supplemental Bill was then filed against his Assignees. It was afterwards agreed, with a view to putting an end to the Suit, that a Motion should be made for an Order that the Costs of all parties should be taxed and paid out of the Fund in Court, that, out of the Balance, the Plaintiffs should receive 102*l.* being one-third of their Debt, in satisfaction of the whole; and that the remainder of the Fund should be paid to the Assignees, and that the merits of *Colvin's* Claim should be discussed on the hearing of the Motion.

Mr. Knight, Mr. Turner, Mr. G. Richards, Mr. Good- eve and Mr. Hughes, in support of the Motion.

Mr. Agar and Mr. Teed, for *Colvin*, referred to the

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BARBER.

108th section of the Bankrupt Act (6 Geo. 4, c. 16) (a), and said that the Injunction had been irregularly granted; that, but for the Injunction, *Colvin* would have obtained Judgment and issued Execution in his Action, long before November 1831; that the Court would take care that he was not placed in a worse situation than he would have been in, if the Injunction had not been granted; *Pulteney v. Warren* (b), *O'Donel v. Browne* (c); and that, the Money having been paid into Court, for the purpose of being disposed of under the Order and Decree of the Court, the Court would distribute it according to the justice of the case.

Mr. *Knight* in reply :

In *Pulteney v. Warren*, there were two Parties only; the one who had been damnified, and the other who had interfered and caused the injury. Here the Money is claimed by the Assignees, and, in such a case, the Court will not institute an Inquiry into the conduct of third Parties, although the Injunction may have been irregularly obtained.

(a) That Section enacts, " That no Creditor having Security for his Debt, or having made any Attachment in *London* or any other place, by virtue of any custom there used, of the Goods and Chattels of the Bankrupt, shall receive, upon any such Security or Attachment, more than a rateable part of such Debt, except in respect of any Execution or Extent served and levied by seizure upon, or any Mortgage of or Lien upon any part of the Property of such Bankrupt before the Bankruptcy; provided that no Creditor though for a valuable consideration, who shall sue out Execution upon any Judgment obtained by default, confession or *nil dicit*, shall avail himself of such Execution to the prejudice of other fair Creditors, but shall be paid rateably with such Creditors."

(b) 6 Ves. 73, see 90.

(c) 1 Ball & Beatt. 262.

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BARBER.

Execution is stayed by an Order for a new Trial; and yet no Equity is raised if the Defendant becomes Bankrupt before the new Trial takes place. An Attachment in the Lord Mayor's Court, is merely an interlocutory proceeding to compel a Defendant to put in Bail, or to enter an Appearance. At any period before Execution levied, the Defendant may remove the Proceedings into a Superior Court; and then the Process in the Lord Mayor's Court is discharged (*d*).

The VICE-CHANCELLOR:

This Case was argued, with great ingenuity, by the Counsel for the Defendant *Colvin*; but I cannot accede to the view which they take of it.

The 108th Section of the Bankrupt Act declares, imperatively, what the Law is. [His *Honor* here read the Section.] Now, *prima facie*, the Bankrupt Laws are to be taken in such a manner as to conduce to the benefit of the Creditors in general. There can be no doubt on the words of this Section: the Proviso at the end of it, has the effect of defeating the right of a fair Creditor for valuable consideration, in a Case in which the Bankrupt, by his own act, may have prevented the Creditor from pursuing a course which he would otherwise have taken. So also a Legal proceeding may prevent a Creditor from suing out Execution so promptly as he might have done; for a Court of Law might be induced, on a frivolous case, to stay Execution by granting a Rule *Nisi* for a new Trial; yet, if the Debtor

(*d*) See *Holt v. Murray*, *antè*, Vol. I, page 485; and *Wetter v. Rucker*, 1 Brod. & Bing. 491.

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LEWES.

thereinbefore directed to be paid to him in manner afore-said, or if he should, at any time, cut down or cause to be cut down any Timber Trees upon the Estates, then, and in any such case, and immediately upon any such interference or conduct of his said Son, the Testator's Will was, and he thereby ordered and directed that the Residue of the Rents of his said Estates should be no longer paid to his said Son, but that his Claim to the same should be forfeited, and that the Trustees should, from thenceforth, for the term of 21 Years, to be computed from the Testator's Decease, (if his said Son should so long live) lay out and invest the Residue of the Rents, after paying the said yearly Sum of 300*l.*, in their Names, in the usual Securities, and lay out the Interest and Dividends of such Securities in like manner, in order to accumulate, and should stand possessed of such Securities and the accumulations thereof, in Trust for the younger Children of his said Son *William Lewes*, to be paid to them, in equal Shares, at the usual times; and, after the expiration of the term of 21 Years, in case his said Son *William Lewes* should be then living, upon Trust that the Trustees should, for the remainder of his said Son's Life, pay and apply the net Residue of the Rents, either unto or for the use and benefit of his said Son and his Family, independent of his Debts, Control or Engagements and in the manner thereinbefore mentioned, or should again lay out and invest such Residue at Interest, so as to accumulate for the benefit of his Children, as his Trustees should think proper: and the Testator thereby wished it to be known to his said Son that, in consequence of the Debts he had improvidently contracted, and which the Testator had already paid to a very considerable amount, the Limitations and Restrictions above mentioned had been made; and he thereby released his said Son from a Debt of 9,497*l.*

The Testator died in March 1828.

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By Deeds of the 30th of April and 1st of May 1829, *William Lewes*, the Testator's Son, conveyed all his Property, including his Interest under the Will, to *G. Pentland* and *O. Lloyd*, as Trustees for payment of his Debts. In Trin. Term, 8th Geo. 4, *T. Quarrington* entered up Judgment against him, under a Warrant of Attorney dated the 5th August 1825, and, in Easter Term 1829, took out *Elegits*, directed to the Sheriffs of *Cardiganshire* and *Carmarthenshire*. In May 1830 *Lewes* was declared a Bankrupt.

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LEWES.

The original Bill was filed to have the Trusts of the Will performed: and *Pentland*, *Lloyd*, *Quarrington* and *Lewes's* Assignees were brought before the Court by Supplemental Bills.

Sir *E. Sugden* and Mr. *G. Richards*, for the Plaintiffs, contended that, under the circumstances above-mentioned, *Lewes's* interest under the Will, had determined, and the Trust for accumulating the Rents, had taken effect. *Dommett v. Bedford* (a), *Shee v. Hale* (b). *Wilkinson v. Wilkinson* (c), *Cooper v. Wyatt* (d).

Mr. *Beames* and Mr. *Hindes*, for the Defendant *Quarrington*:

The words of the Will, by which the Testator intended to exempt the Provision made for his Son, from alienation and liability to his Debts, are inoperative. *Brandon v. Robinson* (e).

(a) 6 T. R. 684.

(d) 5 Madd. 482.

(b) 13 Ves. 404.

(e) 1 Rose, 197; 18 Ves. 429.

(c) 3 Swan. 515.

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LEWES.

The Warrant of Attorney was executed long before the Testator's Death, and even before the date of his Will. A Party cannot forfeit his interest by an act done antecedently to the vesting of that interest. The words of the Proviso clearly refer to some act to be done by *Lewes*. The issuing of the Elegits was an Act done *in invitum*. *King v. Robinson (f)*, *Goring v. Warner (g)*, *Doe v. Carter (h)*.

Mr. *Pepys* and Mr. *Wakefield*, for the Defendant *Pentland*:

The Elegits were not sued out until after the 1st of May 1829; for Easter Term in that year, did not commence until after the 1st of May.

The Testator, in his Will, deals with his Son in the character of Heir, and not as Devisee. He says that, if his Son shall refuse to ratify and confirm his Will, or shall impede or frustrate the Trusts thereof, then the Rents shall be no longer paid to him. The Testator, therefore, had in view the destruction of the Trusts, and not a modification of them. Three causes of Forfeiture are mentioned; but none of them has any reference to anything the Son might do with the Provision made for him. If he dealt with that Provision as this Court would hold him entitled to do, he was not to forfeit it. The forfeiture was to be caused by interfering with the Trusts, and not by dealing with the Provision. Conse-

(f) *Wightw.* 386. See also *Graves v. Dolphin*, *ante* Vol. I. page 66; and *Green v. Spicer*, 1 *Russ. & Myl.* 395.

(g) 2 *Eq. Ab.* 100.

(h) 8 *T. R.* 57.

quently *Pentland* and *Lloyd* are now in a situation to claim the benefit of their Deeds.

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v.

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Mr. Knight, *Mr. Duckworth* and *Mr. Wigram*, for the Defendants, the Assignees under *Lewes's* Bankruptcy, contended that the Deed of the 1st of May 1829, was void as being an act of Bankruptcy: that a distinction had been frequently taken between an active and a passive Alienation; and Bankruptcy had been held not to come within words prohibiting an active Alienation: *Lear v. Leggett* (i): that the object of the Proviso was to prevent *Lewes* from disputing or impeaching the Will, and to secure the existence of the Trusts.

Mr. Barber appeared for the Defendant *Lloyd*, who did not execute the Deed of the 1st of May 1829, and *Mr. Hall*, *Mr. Pitman* and *Mr. Shapter*, for the Executors of the Testator, and other formal Parties.

The VICE-CHANCELLOR :

I do not want a Reply.

My opinion is that the Deed of the 1st of May 1829, is expressly within the terms of the Testator's Will, and that thereby a Forfeiture has been incurred, or rather that, on the execution of that Deed, the Trusts for the accumulation of the Rents commenced. It will not, therefore, be necessary for me to advert to the claims made by the Judgment Creditor and the Assignees under the Commission, for, on the execution of that Deed, *Lewes's* interest wholly determined.

(i) *Ante*, Vol. II. page 479. Affirmed on Appeal. See 1 Russ. & Myl. 690.

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It is clear that though the Testator, in the first part of his Will, may have used terms which, in the contemplation of a Court of Justice, might only amount to a Gift, yet he might very well have thought that those terms did create a Trust. It is perfectly manifest that what he meant, was that, after paying the 300*l.* a year, the Surplus of the Rents should be payments made by the Trustees, to be applied to the maintenance of the Son and his Family: and, afterwards, he has used terms which show it was his intention that the Son should not, by anticipation or otherwise, prevent that application of the Rents. It is not enough to say that, in the first instance, there has been a mere Gift made, and, therefore, no trust created; but the whole of the Will must be taken together; and if I find, in a subsequent part of the Will where the Proviso for accumulating the Rents is contained, that the Testator does designate that form of Gift by the word 'Trust,' then I have only to consider whether the act done has interfered with the manifest intention of the Testator. He provides that, if his Son should refuse to ratify and confirm his Will when thereunto required, "or shall at any time in any manner whatever, impede or frustrate the Trusts thereof or interfere therewith, or with the receipt of the Rents, Issues and Profits of the Estates," then the surplus Rents shall be no longer paid to his Son, but his claim to the same shall be forfeited. It is, I think, perfectly plain that, if this Deed of the 1st of May 1829 were allowed to operate, on the first part of the Will, merely, and be said to be a mere dealing by the Son with that which was given to him absolutely, it would contradict the intention of the Testator.

My opinion is that this Deed of the 1st of May 1829, was an instrument which, if allowed to operate, would have "impeded and frustrated" the Trusts of the Testator's Will, (that is to say,) his intention expressly before declared.

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Declare the Will to be established, and that the Trusts ought to be carried into execution; and that, under the circumstances in the Pleadings mentioned, the Residue of the Rents, after paying the 300*l.* a year, are to be accumulated, as directed by the Will*.

* Affirmed by Lord Lyndhurst, C. 21 January 1835.

COCKER v. LORD EGMONT.

1833:
 9th November.

THE Bill, stated that, on the 12th of June 1820, the Earl of *Egmont* and two other Persons, executed a joint and several Bond to the Plaintiff, for securing the payment of 3,000 *l.*, within six months after the Death of the Earl's Father, (who died in 1822,) with

*Debtor and
 Creditor.
 Pleading.
 Parties.*

A Debtor conveyed certain of his Estates to

Trustees, in Trust to raise a Fund for payment of his Creditors named in a Schedule, and to raise an annual Sum for his own benefit. Several of the Creditors executed the Conveyance; but the Trustees did not sell the Estates, the Creditors having received Sums in or towards satisfaction of their Debts, out of other Estates conveyed by the Debtor upon the same Trusts. A Judgment Creditor, whose name was not mentioned in the Schedule, filed his Bill against the Trustees of the first-mentioned Estates and the Debtor, stating as above, and that the Trustees had entered into the Receipt of the Rents of those Estates, the value of which greatly exceeded the scheduled Debts, and praying that his Debt might be raised and paid out of such parts of those Estates as should not be sold for payment of the scheduled Debts, and that an Account might be taken of the Receipts and Payments of the Trustees, and for a Receiver, and an Injunction to restrain the Trustees from paying any part of the Rents or Produce of the Estates to the Debtor. The Trustees demurred, because the scheduled Creditors who had executed the Conveyance, were not Parties to the Bill. Demurrer allowed.

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Interest in the meantime: that, by Lease and Release of the 1st and 2d of November 1824*, made between, the Earl of the first part, certain of his Creditors whose Names were set down in the Schedules to the Release, of the second and third parts, Viscount *Perceval* of the fourth part, and *E. Tierney* and others (Trustees) of the fifth part, the Earl conveyed certain Estates in *Somersetshire* to the Trustees, in Trust, by Mortgage, Sale and Receipt of the Rents, and by the sale of Timber on the Estates, to raise a Fund for payment of his Debts: that the Release contained a Declaration that such parts of the Estates as should not be disposed of for raising the Fund, and also the Residue of the Fund after Payment of the Debts, should be held and applied upon certain Trusts, in the Release mentioned, for the use or benefit of Lord *Egmont*, or according to his disposition, or to some such or the like effect; and that, by the Release, some annual or other sum was directed to be raised, out of the Estates or the Rents, Profits or Produce thereof, for his benefit: that, as the Plaintiff had not been permitted to see the Release, or to have a copy thereof, he was unable to set forth, more particularly, the contents thereof; but the Defendants ought to set forth such contents, and, especially, the Trusts relating to the application of such parts of the Estates and the Rents and Produce thereof as should not be sold for the purpose of forming the Fund before-mentioned, and also the Trusts relating to the application of the Residue of the Fund, after payment of the Debts, and to any annual or other Sum directed to be raised out of the Estates, or the Rents, Profits or

* See *Newton v. Lord Egmont*, ante, Vol. IV. p. 574, and Vol. V. p. 130, where the Release is more fully set forth.

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Produce thereof, for Lord *Egmont's* use or benefit: that several of the Creditors named in the Schedules had executed the Release: that the Trustees had entered into and still were in the possession or receipt of the Rents of the Estates, but had not sold any part thereof, though they had sold Timber thereon: that the value of the Estates greatly exceeded the amount of the Debts chargeable thereon under the Release, and the Income thereof was more than sufficient to keep down the Interest of the Debts: that it would not be necessary to sell the whole of the Estates for the purpose of forming the Fund before mentioned, or, if all the Estates should be sold, there would be a large surplus of the Fund after payment of the Debts, as would appear if the Defendants would disclose the value of the Estates, the amount of the Rents, and of the Debts mentioned in the Schedules: that Lord *Egmont* had executed some other Deeds whereby he conveyed his Estates in *Ireland*, to Trustees for the benefit of his Creditors, subject, however, to the payment to himself, in the first instance, of a large Annuity during his Life: that the whole or the greater part of the last-mentioned Estates had been sold, and, out of the Proceeds, all or most of the Creditors named in the Schedules to the Release of November 1824, had received considerable Sums in or towards payment of their Debts: that that release and the other Trust Deeds comprised the whole of Lord *Egmont's* Property: that the Plaintiff, whose Debt still remained due, had requested the Trustees of the Release to permit him to execute that Deed, but they had refused so to do: that the Plaintiff, being unable to obtain payment of his Debt by any other means, had brought an Action on his Bond in the Common Pleas, against Lord *Egmont*, and had obtained a Judgment

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which had been duly docketed, and had issued Writs of *elegit* and *feri facias* thereon, directed to the Sheriff of *Somersetshire*; but the Plaintiff was advised that, under the circumstances before mentioned, he could not have the benefit of his Judgment against the Trust Estates comprised in the Release, without the assistance of the Court of Chancery. The Bill prayed that the amount of the Principal, Interest and Costs due to the Plaintiff on his Judgment, might be raised and paid to him out of such parts of the Trust Estates comprised in the Release of November 1824, as should not be sold in due execution of the Trusts thereby created for payment of Lord *Egmont's* Debts, or out of the Surplus of the Monies produced by the Sale, Mortgage, or other disposition of such Estates and the Rents, Profits and Produce thereof in a due execution of the Trusts, after the payment of such Debts; and that, for the purposes aforesaid, *all necessary Accounts might be taken of what was due to the Plaintiff on his Judgment, and of the Trust Estates, and the Receipts and Payments of the Trustees under the Release*; and that a Receiver might be appointed of the Rents of those Estates, or so much thereof as had not been sold or disposed of in execution of the Trusts, and that in the meantime the Trustees might be restrained from paying, to Lord *Egmont*, and that he might be restrained from taking possession of or receiving any part of the Trust Estates, or the Rents, Profits or Produce thereof.

The Defendant *Tierney* demurred for want of Equity, and, *ore tenus*, because none of the Creditors who had executed the Release of November 1824, were Parties to the Bill.

Sir *E. Sugden* and Mr. *Girdlestone*, Junior, for the
Defendant *Tierney* :

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The Plaintiff is a Bond Creditor of Lord *Egmont's* ; but he has not executed the Release, and, therefore, his right is adverse to that Deed, and he cannot claim anything as a *cestui que Trust* under it. He asks for an Account of the Trustees' Receipts and Payments, in order to ascertain the Surplus: but he is not entitled to compel the Trustees to render an account to him, which they must render to their *cestui que Trusts*. The Bill might, perhaps, have been sustained, if it had alleged that the Trusts had been performed, and that the Trustees had an ascertained Surplus in their hands. But it proceeds on the speculation that there will be a Surplus, and it alleges that the Trusts have not been performed, and that the Debts have not been paid.

Mr. *Knight* and Mr. *Hayter* for the Plaintiff :

If Lord *Dillon v. Plashett* (a) and *Lewis v. Lord Zouche* (b) be law, the Plaintiff has a right to obtain, in this Court, the relief he asks. The Trustees represent the body of Creditors, and, therefore, it is sufficient to make them parties. The Surplus is not all that Lord *Egmont* is entitled to: by the Deed, an annual Sum was directed to be raised for his benefit: that annual Sum is liable to be affected by the *Elegit*. The question, whether it is necessary to make the Creditors Parties, has been decided by *Lewis v. Lord Zouche*. Besides, the Plaintiff has, substantially stated, in his Bill, that he cannot ascertain who the Creditors are.

Sir *E. Sugden*, in reply :

This is the Demurrer of one of the Trustees, and

(a) 2 Bligh, New Ser. 239. (b) *Ante*, Vol. II. p. 388.

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not of Lord *Egmont*. They cannot be decreed to account in the absence of the Creditors. In *Lewis v. Lord Zouche* the *Master* had found that certain Persons were entitled to Annuities, and there was an ascertained Surplus which was payable to Lord *Zouche*. But, here, the Surplus has not been ascertained; the Debts have not been paid, nor have the Estates been sold. In *Dillon v. Plaskett* also, a clear sum of 5,000 *l.* a year was secured to Lord *Dillon*.

The VICE-CHANCELLOR, having referred to the Briefs in *Newton v. Lord Egmont*, said:—I confess it appears to me that the Creditors are necessary Parties.

Demurrer *ore tenus* allowed, with liberty to amend by adding Parties.

WOOLLAMS v. BAKER.

1833:
13th November.*Practice.*
Pro Confesso.

Where a Bill is ordered to be taken *pro confesso*, the Decree may be made subsequently, although it is usually taken at the same time.

IN this Case there was one Defendant only, and an Order had been obtained for taking the Bill *pro confesso* against him, but no Decree had been then made. The Registrar having declined to set down the Cause for the purpose of the Decree being made, on the ground that the Decree ought to have been obtained at the time when the Order for taking the Bill *pro confesso*, was made:

Mr. *Wakefield*, for the Plaintiff, now applied to have the Cause set down. He said that, though the Plaintiff

might have taken a Decree when the Order was made, he was not compellable so to do.

1833.

WOOLLAMS

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BAKER.

And the *Vice-Chancellor* being of that opinion, directed the Cause to be set down, and the Clerk in Court to attend with the Record.

The following Cases were referred to by Mr. *Wakefield*: *Ellis v. Edwards* (a), in which the Order for taking the Bill *pro confesso* was made on the 30th of May 1769, and the Decree on the 8th of June 1769, and *Landon v. Ready* (b), where the Order was made on the 27th of March 1821, and the Decree the 11th of November 1821.

(a) Not reported.

(b) See 1 Sim. & Stu. 44; and *Baker v. Keen*, *ante*, Vol. IV. p. 498.

CASBORNE v. BARSHAM.

1835:

2d July.

*Insolvent
Debtor. Plea.*

THE Plaintiff was the Assignee of the Estate and Effects of one *Chandler*, who had taken the benefit of the Insolvent Debtors' Act, 7 Geo. 4, c. 57. The object of the Bill (which contained an allegation that the Suit had been instituted with the consent in writing of the major part of the Creditors of the Insolvent, and with the approbation of the Insolvent Debtors' Court,) was to have a Deed, which the Insolvent had executed to the Defendant, delivered up to be cancelled, on the ground that it had been fraudulently obtained.

To a Bill filed by the Assignee of an Insolvent Debtor, the Defendant pleaded that the Consent of the Creditors and of the Insolvent Debtors' Court, to the institu-

tion of the Suit, had not been obtained. Plea over-ruled.

Spencer v. Payne 2 S. & S. 21. 437
Galsworthy v. Surrant 2 D. F. & S. 469.
La Porte v. Hyld 2 D. F. & S. 646.

1835.

CASBORNE

v.

BARSHAM.

The Defendants pleaded: "That, by the Statute made and passed in the 7 Geo. 4, intituled 'An Act to amend and consolidate the Laws for the Relief of Insolvent Debtors in *England*,' it is enacted and provided, that no Suit in Equity shall be commenced by the Assignee or Assignees of any Insolvent without the approbation of the Court for Relief of Insolvent Debtors in *England*, or of one of the Commissioners thereof:" *

* Sect. 24 of the Act, which is partly set forth in the Plea, enacts as follows: "That it shall and may be lawful for the Assignee or Assignees of any such Prisoner, and such Assignee or Assignees is and are hereby empowered to sue from time to time, as there may be occasion, in his or their own Name or Names, for the recovery, obtaining and enforcing of any Estate, Effects or Rights of such Prisoner, but in Trust for the Benefit of such Assignee or Assignees and the rest of the Creditors of such Prisoner, according to the Provisions of this Act; and to give such Discharge and Discharges to any Person or Persons who shall be respectively indebted to such Prisoner as may be requisite, and to make Compositions with any Debtors or Accountants to such Prisoner, where the same shall appear necessary; and to take such reasonable part of any such Debts as can, upon such Composition, be gotten, in full discharge of such Debts and Accounts, and to submit to Arbitration any difference or dispute between such Assignee or Assignees, and any Person or Persons, for or on account or by reason of any Matter, Cause or thing relating to the Estate and Effects of such Prisoner; provided, nevertheless, that no such Composition or submission to Arbitration shall be made, nor any Suit in Equity be commenced, by any such Assignee or Assignees, without the consent in writing of the major part in value of the Creditors of such Prisoner, who shall meet together pursuant to a Notice of such Meeting, to be published at least 14 days before such Meeting, in the *London Gazette*, and also in some Newspaper most usually circulated in the neighbourhood of the place where such Prisoner had his or

and they averred that the Suit was commenced without such approbation having been obtained.

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CASBORNE

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Mr. *Elderton*, in support of the Plea, called the attention of the Court to the question being raised by Plea and not by Demurrer, and cited *Ocklestone v. Benson* (a), *Doe v. Spencer* (b), *Bevan v. Lewis* (c), *Bozon v. Williams* (d), *King v. Tullock* (e), *Jones v. Yates* (f), *Dance v. Wyatt* (g), *Smith v. Biggs* (h), *Piercy v. Roberts* (i), *Allison v. Rayner* (k), *Bensley v. Bignold* (l).

Mr. *G. Richards*, in support of the Bill, relied on *Piercy v. Roberts*, *Jones v. Yates*, *Dance v. Wyatt*, and *Doe v. Spencer* (m), and said that the object of the Legislature, in requiring the Consent of the Creditors and of the Insolvent Debtors' Court, to the institution of a Suit, was not to skreen the Debtors, but to protect the Estate of the Insolvent: that, as the Act gave the Assignee a power which the Law did not give him, namely, to sue, in his own Name, for *Choses in Action* belonging to the Estate, it imposed upon him the necessity of obtaining the Consent of the Creditors and of the Court; without which he would not be entitled to retain his Costs out

her last usual residence before his or her imprisonment as aforesaid, nor without the approbation of the said Court, or of one of the Commissioners thereof."

(a) 2 Sim. & Stu. 265.

(b) 3 Bing. 203.

(c) 2 Glyn. & Jam. 245.

(d) 2 Youn. & Jerv. 475.

(e) *Ante*, Vol. II. p. 469.

(f) 3 Youn. & Jerv. 373.

(g) 6 Bing. 486.

(h) *Ante*, Vol. V. p. 391.

(i) 1 Myl. & Keen, 4.

(k) 7 Barn. & Cress. 441.

(l) 5 Barn & Ald. 335.

(m) 3 Bing. 203.

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of the Estate: that the question was a question of Law, and therefore, it was immaterial whether it was raised by Demurrer, by Plea, or at the hearing of the Cause.

The VICE-CHANCELLOR :

This case has been very fully and ably argued; and I am glad it has occurred, as it gives me an opportunity of deciding the question as I think, in reason and Law, it ought to be decided.

In *King v. Tullock*, if I had had to decide the question originally, I should have decided it otherwise than I did, but I felt myself bound by the high Authority of Sir *J. Leach* in *Ocklestone v. Benson*: for I remember Lord *Eldon* saying that a single Decision, unappealed from, ought not to be disregarded. The first Decision by Sir *W. Alexander*, was in conformity to the Decision of Sir *J. Leach*: but, on further consideration his Lordship changed his Opinion. And it appears that, when the general point again came before Sir *J. Leach*, in *Piercy v. Roberts*, he did not choose to decide it without conferring with some of the Judges of the Courts of Common Law. He did confer with them, and their Opinion was that the Provision made by the Statute, was to be considered as made for the benefit of the Creditors alone, and that it was not competent to the Defendants to take advantage of the objection that the Suit had been instituted without the Consent of the Creditors: that Opinion was in conformity to the Decision in *Dance v. Wyatt*, and *Doe v. Spencer*.

It could not be the intention of the Legislature to prevent the Assignee of an Insolvent Debtor from im-

mediately filing a Bill; for there might be a case in which any delay would be attended with the total destruction of the Property, as, for instance, a case of Waste.

1833:
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v.
BARSHAM.

My Opinion is that the Plea ought to be over-ruled, but without Costs, owing to the conflict of Authorities, and because the Plaintiff has thought proper to allege, in his Bill, that the Consent and Approbation of the Creditors and of the Court had been obtained.

HASLUCK v. STEWART.

MOTION for an Attachment for want of Answer against a Defendant resident in *Scotland*, who had been served with a Subpœna, under 2 & 3 Will. 4, c. 33 (a), and had appeared to the Bill.

1835:
24th July.
Practice.
Process.

The question was, whether Notice of the Motion ought to have been given to the Defendant.

Mr. Koe, for the Plaintiff.

Mr. Jacob, for the Defendant.

The *Vice-Chancellor* said, he would confer with the *Master of the Rolls* upon the subject.

On a subsequent day His Honor said that he had consulted the *Master of the Rolls*, and that they were both of opinion that, where a Defendant had been served with a Subpœna under the Act, no subsequent Process ought to be granted, except upon a Motion of which Personal Notice had been given to the Defendant.

Where a Defendant has been served with a Subpœna under 2 & 3 W. 4, c. 33, Personal Notice must be given to him before any subsequent Process is applied for.

See Godson v. Cook, 2 Sim. 519

(a) See *Parker v. Lloyd*, ante, Vol. V. p. 508.

1833.

ATTORNEY-
GENERAL

v.

CORPORATION
OF
ROCHESTER.ATTORNEY-GENERAL v. THE CORPORATION
OF ROCHESTER.

AFTER the Report of this Case (*ante*, p. 273) was sent to press, the Reporter was referred to the after-mentioned Acts of Parliament, from which it appears that Lepers and Bedridden People, were authorised to appoint persons called Proctors, to gather Alms for their relief. See 1 Edw. 6, c. 3, s. 19; 3 & 4 Edw. 6, c. 16, s. 7.

In 14 Eliz. c. 5, (for the punishment of Vagabonds) Persons that be, or utter themselves to be Proctors, going about the country, without sufficient authority derived from the Queen, are mentioned as offenders within the Act, s. 5.

Burn probably alludes to them, when he mentions, as one description of Persons who are to be deemed Rogues and Vagabonds: "Persons going about as Collectors for Prisons, Gaols or Hospitals." See *Burn's Just.* vol. 4, p. 412, 18th edit.

Watts, the founder of the Charity, was Recorder of *Rochester*.

END OF PART II VOL VI

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

MOORE v. LANGFORD AND WIFE.

1835:
8th July.

THIS was a Suit on behalf of the Creditors of *J. W. Waters*, deceased, against Mr. and Mrs. *Langford*, the latter being the Administratrix of the deceased.

Exceptions.

The Bill charged the Defendants with misconduct in the administration of the Assets, and, in addition to the usual prayer, asked that Mr. *Langford* might be ordered to pay the Costs of the Suit, in case the Intestate's Estate should be insufficient to pay the same together with the Debts and Funeral Expences.

If one general Exception is taken to the Master's Certificate, approving of Interrogatories under a Decree, and the Court is of opinion that one only of the Interrogatories ought not to have been approved of, the Exception will be allowed.

Interrogatories.

The Defendants, by their Answer, admitted that since the Bill was filed they had paid three of the Intestate's simple contract Debts, to the amount of 212*l.* 10*s.* 9*d.*, and had expended the residue of the Assets which remained in their hands, in obtaining the Letters of Administration.

If, in a Creditor's Suit, a Decree is made in the usual form,

no special Interrogatory for the examination of the Defendants, ought to be allowed, although a Case for directing special Inquiries, is made on the Record.

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The Decree neither contained any declaration, nor any special inquiries, but was in the usual form.

The *Master* allowed certain Interrogatories for the examination of the Defendants pursuant to the Decree; the two first and the last of which were the common Interrogatories for the examination of personal Representatives; but the third was special, and asked whether the Defendants had not, since the filing of the Bill, paid any and what Debts of the Intestate, and to whom, and for what reasons, and on what accounts the same were due; and whether such Debts were really due, and whether such Payments were not made, voluntarily, to Relations or Connections of the Defendants, without any proceedings or applications to obtain payment, and for the purpose of defeating the Plaintiff in this Suit, and under some Agreement or understanding that the sums paid should be returned. The Interrogatory then inquired after Letters and other Papers, in the Defendant's possession, relating to the matters thereby inquired after, and required the Defendants to set forth a list of them, and to set forth the purport of such of them as they had destroyed,

The Defendants excepted to the *Master's* Certificate, in the following terms:

"For that the said *Master* has, by his Certificate, certified that, in pursuance of the Decree made in this Cause, dated the 21st December 1831, he had settled and allowed the following Interrogatories for the examination of the Defendants." All the Interrogatories were then set forth, at full length; and the Exception concluded as follows:

"Whereas the said *Master* ought not to have allowed such Interrogatories."

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Mr. *Wakefield* and Mr. *K. Parker*, in support of the Exception, contended that the Decree being the common Decree in a Creditor's Suit, the third Interrogatory, to which alone they objected, ought not to have been allowed.

Mr. *Knight* and Mr. *James*, for the Plaintiff, said that the Exception extended to all the Interrogatories, and as it had been admitted that the *Master* was right in allowing three of them, the Exception covered too much, and ought, therefore, to be overruled. *Pearson v. Knapp* (a); *Hodges v. Salomons* (b); *Green v. Weaver* (c).

Secondly: that the third Interrogatory was proper in consequence of the payments made, by the Defendants, to Creditors of the Intestate, after the Bill was filed: that, after Bill filed, the Personal Representative could not prefer any Creditor; that, at any rate, such preference was open to suspicion, and justified the Interrogatory.

Mr. *Wakefield*, in reply, said that, the Case appearing on the Record and no special Inquiries being directed by the Decree, it was improper and irregular to exhibit a special Interrogatory: that a Personal Representative had a right to prefer a Creditor, after Bill filed and at any time before a Decree; *Maltby v. Russell* (d): that the Cases cited turned on the grammatical construction

(a) 1 Myl. & Keen, 312. (c) *Antè*, Vol. I. p. 404.

(b) 1 Cox, 249. (d) 2 Sim. & Stu. 227.

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of the particular Exception, and did not decide that several matters or objections might not be included in one Exception, as was evidenced by the leave repeatedly given to amend the Exception to which the objection applied, by adding such words as, "or some or one of such particulars," which had been done in some of the Cases cited, and in the recent Case of *Russell v. Dight*, before Sir John Leach, Master of the Rolls, in Hilary Term 1834, in *Carbonell v. Bessell*, before The present Vice-Chancellor in the same year, and in *Gompertz v. Best*, before Lord Lyndhurst, Chief Baron, in December 1834: that, if the Exception was that the Master was wrong in all and each particular, then, if he was right in any particular, the Exception failed; but if, as in this Case, the Exception was that the Master ought not to have allowed such Interrogatories, then, if the Master had improperly allowed any, or any part of any Interrogatory, the Exception was good.

THE VICE-CHANCELLOR:

With respect to the question of Form, I think that it sufficiently appears, by the Judgments in the Cases of *Green v. Weaver*, and *Pearson v. Knapp*, that the Decisions of the Judges depended on the Form in which the Exceptions were framed, and that they decided on the Form. Those Decisions do not afford any such general Rule as appears, at first sight, to be laid down by Lord Alvanley, M. R., in *Hodges v. Salomons*, and the Case of *Bailey v. Timperon (e)*, decided on the 31st January 1827, which is mentioned in a note in my own copy of *Cox's Reports*.

If the Master allows all the Exceptions, and the Exception to his Report, is because he ought not to have

(e) Reg. Lib. A. 1826. fol. 477.

allowed all of them, the Party excepting will succeed if he shows that the *Master* was wrong in allowing one; but, if the Exception is because the *Master* ought not to have allowed any, then, if one was proper to be allowed, the general Exception fails as to all: and the distinction appears to me so obvious, that I cannot conceive that any person could have any doubt on the subject. I am of opinion, therefore, that the Exception in this Case is right in Form.

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The next question is, whether the *Master* was right in allowing the third Interrogatory. It struck me, when I first read that Interrogatory, that it was in such a Form as I never saw before, and that, if it were generally followed, a trap would be laid for a man's conscience. This is one reason why I do not feel inclined to support it. Besides, I doubt very much, if a Decree in a Creditor's Suit be made in the common Form, whether any such Interrogatory ought to be allowed at all. At all events, this Interrogatory ought to be modified or allowed in part only: and, consequently, I shall refer it back to the *Master* to review his Certificate, so far as the third Interrogatory is concerned.

1835:
24th Nov.

WALTON v. MERRY.

Practice.
Infant trustee.
Construction of
11 Geo. 4
and 1 Will. 4.
c. 60.

THE Question in this Case was, whether, under 11 Geo. 4 and 1 Will. 4, c. 60, s. 11, the Infant Heir of a Vendor could be ordered, by the Decree, to convey to the Purchaser, or whether the Order must not be obtained by Petition.

Where the Court, in any proceeding in a Cause, declares a Party to be a Trustee within 11 Geo. 4 & 1 Will. 4, c. 60, it may, by the same Order, direct a Conveyance to be made. *3 A & N. 463.*
12 A. 117.

Mr. *Webster* contended that a Petition was not necessary.

Mr. *James Russell*, *contrà*, referred to *Fellowes v. Till* (a), and *Prytharch v. Havard* (b).

The *Vice-Chancellor* said he was of opinion, on the first words of the Section, that, where the Court, in any proceeding in a Cause, declares a Party to be a Trustee, it may, by the same Order, direct a Conveyance to be made.

(a) *Antè*, Vol. V. p. 319.

(b) *Antè*, p. 9.

TYTHERLEIGH v. HARBIN.

1835 :
24th Nov.

Will.
Construction.

THOMAS TYTHERLEIGH, by his Will dated the 8th of February 1830, devised to Trustees and their Heirs his Estate in the Parish of *Yeovil*: " Upon Trust that my said Trustees, or the Survivors or Survivor of them, his Heirs, Executors or Administrators do and shall, at their or his discretion, demise or lease the said Estate, Lands and Premises, for such terms, and in such manner as they or he shall think proper and most for the benefit of the said Estate, and upon Trust to receive the Rents, Issues and Profits and yearly Proceeds thereof, as the same shall respectively become due and payable and be received, and pay the same unto my Brother *Robert Tytherleigh* during his Life, by half-yearly payments, for his own use and benefit, but not by way of anticipation; and, from and immediately after the decease of the said *Robert Tytherleigh*, then upon Trust that they my said Trustees, or the Survivors or Survivor of them, his Heirs, Executors or Administrators, do and shall convey, assign, transfer and make over the said Estate, Lands and Premises unto, or between or amongst all and every, and such one or more of the Child or Children of the said *Robert Tytherleigh* who shall be living at the time of his decease, and the Issue of such of them as shall be then dead leaving Issue, such Issue to take between or amongst them the Share only which their Parents or Parent would have been entitled

Testator devised an Estate to Trustees, in Trust for *R. T.* for Life, and after the death of *R. T.*, in Trust to convey the Estate unto, between or amongst all and every and such one or more of the Child or Children of *R. T.*, who should be living at his decease, and the Issue of such of them as should be then dead leaving Issue, such Issue to take between or amongst them the Share which their Parent or Parents would have been entitled to if then living.

R. T. survived the Testator, and died leaving several Children and the Issue of another Child who was dead at the date of the Will. Held that such Issue were entitled to take, amongst them, an equal Share of the Estate with the surviving Children.

Siles v Siles 8 L. 360 24
Janri v Bond 9 L. 529 *Coulthurst v Carter* 15 Beav. 428.
In re King 16 id 55. *Re Thompson's Trusts* 52. 14. 283.
Charles v Charles 3 Drewry 44. *Paulding's Trust* 26 Beav. 263.
Howard v Jones 3 Sel. 48. 534. *Re Potter's Trust* 8 Eq. 58

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 v.
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to *if then living*, their Heirs, Executors and Administrators, as Tenants in Common and not as Joint Tenants, to and for their own absolute use and benefit.

The Testator died on the 23d of December 1833.

Robert Tytherleigh died on the 15th of February 1834, leaving the Plaintiffs his only Children him surviving, and without having had any Child who died leaving Issue since the date of the Will.

The Plaintiffs, conceiving that they were the only persons beneficially interested in the Estate, agreed to sell it to the Defendant, who refused to complete his Purchase, alleging that the Issue of *James Tytherleigh* (a Child of *Robert Tytherleigh*, who died before the date of the Will), were entitled, under it, to the Share which their deceased Father would have taken in the Estate, if he had been living at the death of *Robert Tytherleigh*. The Plaintiffs, however, contended that *James Tytherleigh* having died previously to the date of the Will, his Issue were, according to the true construction of the Will, excluded from any Share or Interest in the Estate.

The Bill prayed for a Specific Performance of the Agreement.

The Parties having agreed to abide by the decision of the Court,

Mr. *Knight* and Mr. *Amphlett*, for the Plaintiffs, said that the Children of *Robert Tytherleigh* living at his decease, were the primary Devisees, and that nothing was given to their Issue, except by way of substi-

tution; and, consequently, as *James Tytherleigh* died before the date of the Will, his Issue could not be entitled to any Interest in the Estate. *Christopherson v. Naylor* (a); *Thornhill v. Thornhill* (b); *Butter v. Ommaney* (c); *Waugh v. Waugh* (d).

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Mr. *Kindersley* and Mr. *Berrey*, for the Defendant:

In this Case there is a substantive, original Gift to the Children and the Issue of deceased Children of *Robert Tytherleigh*. In *Christopherson v. Naylor*, there was a substantive Gift to the Children only. So, in *Thornhill v. Thornhill*, the Nephews and Nieces of the Testator were, alone, the primary Legatees: and, in *Butter v. Ommaney*, there was no original Gift to the Children of the Testator's Brothers and Sisters.

According to the reasoning of Sir *John Leach*, Master of the Rolls, in *Waugh v. Waugh*, *Eleanor Waugh* ought to have taken a Share in the 5,000*l.*; for her Father would have taken, if he had been living. Here the words are, "If then living;" and *James Tytherleigh* would have taken a Share if he had been living at the death of *Robert Tytherleigh*.

Mr. *Knight*, in reply:

No Case can be produced in which, under a Devise of this description, the Issue of a pre-deceased Child have been admitted to a Share. The Testator had in mind a Child or Children then living. By the words: "The Issue of such of them as shall be then dead,"

(a) 1 Mer. 320. (b) 4 Madd. 377. (c) 4 Russ. 70.
(d) 2 Myl. & Keen, 41.

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TYTHERLEIGH
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he could not mean the Issue of a Child or Children, who could not, by any possibility, take. The Case turns on this: was it or was it not substitution that was intended? The Issue were to take only what the Parent would have taken if then living, and the deceased Child could not have taken.

The VICE-CHANCELLOR :

In this Case there is an original substantive Gift to the Child or Children of *Robert Tytherleigh* living at the time of his decease and the Issue of such of them as should be then dead leaving Issue; and I think that the word "them" means nothing more than "Child or Children." This Case, therefore, differs from the first three Cases cited for the Plaintiffs. The Testator then says: "Such Issue to take, between or amongst them, the Share only which their Parent or Parents would have been entitled to, if then living." These words were necessary in order to show what Share the Issue of a deceased Child were to take amongst them; for, if there had been two surviving Children and Ten Children of a deceased Child, and those words had not been used, there might have been a question whether each of the ten Grandchildren was not entitled to an equal Share with the two surviving Children.

In *Waugh v. Waugh* the Decision might, I think, have been supported on the ground that the Testator, by making a separate Provision for *Eleanor Waugh* in a subsequent part of his Will, had shown an intention to exclude her from any Share of the 5,000*l.*, and thereby had, himself, put a construction on the language which he had previously used.

I think that I am not overruling *Waugh v. Waugh*, or any of the other Cases that have been cited, if I hold, merely on the language of this Testator, that the Issue of the deceased Child are entitled to take.

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KEMBLE v. KEAN (a).

1829:
1st December.

Jurisdiction.
Agreement.
Injunction.

IN February 1828 an Agreement in writing to the following effect, was made between the Plaintiffs, who were the Proprietors of *Covent-garden Theatre*, and the Defendant, a celebrated Actor: that the Defendant should act at the Theatre for 24 Nights, at a Salary of 50*l.* for each Night: that the Engagement should commence on the 1st October, and conclude before Christmas then next: that the Defendant should give the preference, to the Plaintiffs, in the renewal of an Engagement, and should not perform at any other Theatre in London during the period of his Engagement.

The Proprietors of *Covent-garden Theatre* agreed with an Actor, that he should act for Twenty-four Nights, during a certain Period of Time, at their Theatre, and that, in the meantime, he should not act at any other Place in London. Held that the Court cannot enforce the positive part of the Contract, and therefore, it will not restrain by Injunction a breach of the negative Part.

The Defendant, accordingly, acted 16 Nights; but was unable to complete his Engagement before Christmas 1828, in consequence of an accident that happened to the Gas-works in the Theatre. An Agreement was then made between the Parties, for a new Engagement to commence after Christmas 1828, for 12 Nights performance, (instead of the eight that remained under the

* A Report of this Case, which was omitted in its proper place, is now given, as it was referred to and much observed upon in the next Case. The Reporter had no Notes of the Arguments. The Judgment was taken from a Short-hand Writer's Notes, which The *Vice-Chancellor* perused on the hearing of the next Case, and said were correct.

*overruled by Lord & King
1 Dec 5. A. & S. 604*

*Decided in King v. King
of which see 10. 1. 1830
1830 - 1831 10. 1. 1830*

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first Engagement) upon the same terms as before. The Defendant, accordingly, acted on the Nights of the 5th and 8th of January 1829, and was to have acted again on the 12th, but, on that Night, he was unable to appear before the Public. Shortly afterwards, the Defendant having expressed a wish to suspend his performance in London and retire into the Country to recruit his Health and study some new Parts, the Plaintiff *Kemble* informed him, by Letter dated the 21st January 1829, that the Plaintiffs acceded to his Wish, it being understood that he would be ready, on the commencement of the Season 1830-31, to return, when required, to his Engagement, of which 10 Nights remained uncompleted, and that, in the meantime, he was not to act in London. The Defendant wrote an Answer to this Letter, on the 22d of January, stating that he accepted the Proposals made by the Plaintiffs.

In November 1830, the Defendant returned to *London*, and, shortly afterwards, entered into an Engagement to act at *Drury-lane* Theatre; upon which the Bill in this cause was filed, praying that the Defendant might be decreed specifically to perform his Agreement with the Plaintiffs, contained in the Letter of the 21st of January 1829, and that, in the meantime, he might be restrained from acting at *Drury-lane* Theatre, or at any other Place in *London*.

On the 28th of November, Lord *Lyndhurst*, C., granted an Injunction, *ex parte*, restraining the Defendant from acting at *Drury-lane* or any other Place in *London*, until he should have acted 10 Nights at *Covent-garden*, with Liberty to the Defendant to move to dissolve the Injunction, before The *Vice-Chancellor*.

The Motion to dissolve was now made by Mr. *Knight* and Mr. *Wright*, and opposed by Mr. *Pemberton*.

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The VICE-CHANCELLOR :

The Agreement in question is such an one as this Court cannot perform.

In the Case of a mere Contract between two persons who are both carrying on the same trade, that one shall not carry on his trade within a limited distance in which the Party contracted with intends to carry on his trade, the whole Agreement is of so genuine a kind, that the Court would enforce the Performance of the Agreement by restraining the Party, by Injunction, from breaking the Agreement so made.

In the Case where the Parties are Partners, and one of the Partners contracts that he shall exert himself for the benefit of the Partnership, though the Court, it is true, cannot compel a Specific Performance of that part of the Agreement, yet, there being a Partnership subsisting, the Court will restrain that Party (if he has covenanted that he will not carry on the same trade with other Persons) from breaking that part of the Agreement. That is in case of a Partnership.

In the Case of *Morris v. Colman* (a), the Bill was filed by *Morris* against *Colman*, for the purpose of having a question upon the Articles of Partnership, determined, and for restraining *Colman* from doing many acts which he was disposed to do ; and I think, in that

(a) 18 Ves. 437.

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case (for I was Counsel for *Colman* from the beginning to the end), that *Colman* always stood on the defensive. The only question was whether *Colman* should be at liberty to do certain acts which he insisted he was at liberty to do, and *Morris* contended he was not. Now I apprehend that what Lord *Eldon* says, in giving his Judgment upon that point, must be taken with reference to the subject that was before him : and I perfectly well recollect the time when the Injunction was granted to restrain Mr. *Colman*, but I am not quite sure it is exactly in the way in which the Report represents ; but *Colman* insisted, generally, that he had a right to write Dramatic Pieces for other Theatres ; and then there was an Injunction granted to restrain the Representation of one of the Pieces which he had written, and which was intended to be represented, I think, at *Covent-garden* Theatre. In the Argument it was said that the particular Provision which is stated in the Case, was a Provision restraining *Colman* from writing Dramatic Pieces for any other Theatre ; and, in the Argument, it was said, by the Counsel for the Plaintiff, that that Provision was no more against public policy than a Stipulation that Mr. *Garrick* should not perform at any other Theatre than that at which he was engaged, would have been. Now, with reference to what was said, by Counsel, upon arguing the Case of a Partnership, Lord *Eldon* says : “ If Mr. *Garrick* was now living, would it be unreasonable that he should contract with Mr. *Colman* to perform only at the *Haymarket* Theatre, and Mr. *Colman* with him to write for that Theatre alone. Why should they not thus engage for the talents of each other ? ” That mode of putting the question appears to me to show that Lord *Eldon* is speaking of a Case where the Parties are in Partnership together ; because it would be a

strange thing that one should contract to perform only at the *Haymarket* Theatre, and the other, to write for that Theatre alone, except in the Case of a Partnership, where both Parties would be exerting themselves for their mutual benefit; because, if they were not in Partnership, the effect of such an Agreement might be that neither might exert his talents at all. In this Case, however, there is no Partnership whatever between the Proprietors of *Covent-garden* Theatre and Mr. *Kean*; but the Contract is nothing more than this, that Mr. *Kean* shall, for a given Remuneration, act a certain number of Nights at *Covent-garden* Theatre, with a Proviso that, in the meantime he shall not act at any other Theatre; and it is quite clear that this Bill is filed for the purpose of having the Performance of an Agreement with regard to his Contract to act.

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[His Honor here stated the substance of the Bill, and then proceeded:—]—So that it was an Agreement to act at *Covent-garden* Theatre, a certain number of Nights in the Season 1830–31, and that, in the meantime, the Defendant should not act in *London*: and the Bill is filed for the purpose of enforcing the performance of that Agreement, which mainly consists in the fact of his acting; and it appears to me, that it is utterly impossible that this Court can execute such an Agreement.

In the first place, independently of the difficulty of compelling a man to act, there is no time stated; and it is not stated in what Characters he shall act; and the thing is, altogether, so loose that it is perfectly impossible for the Court to determine upon what scheme of things Mr. *Kean* shall perform his Agreement. There can be no prospective declaration or direction of the Court, as to the performance of the Agreement; and,

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supposing Mr. Kean should resist, how is such an Agreement to be performed by the Court? Sequestration is out of the question; and can it be said that a man can be compelled to perform an Agreement to act at a Theatre by this Court sending him to the *Fleet* for refusing to act at all? There is no method of arriving at that which is the substance of the Contract between the parties, by means of any process which this Court is enabled to issue; and therefore (unless there is some positive authority to the contrary) my opinion is that, where the Agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this Court, and it is only guarded by a negative Provision, this Court will leave the parties, altogether, to a Court of Law, and will not give partial relief by enforcing only a negative stipulation. I think, for the reasons which I have stated, that what Lord *Eldon* has said in the case of *Morris v. Colman* bears upon this Case.

In *Clarke v. Price* (b) (in which, also, I was of Counsel,) there was a positive stipulation, by *Price*, that he would write Reports for *Clarke* the Bookseller. Lord *Eldon* says, in his Judgment upon that Case, "The Case of *Morris v. Colman* is essentially different from the present. In that Case, *Morris, Colman* and other Persons *were engaged in a Partnership* in the *Haymarket* Theatre, which was to have continuance for a very long period, as long indeed as the Theatre should exist. *Colman* had entered into an Agreement which I was very unwilling to enforce, not that he would write for the *Haymarket* Theatre, but that he would not write for any other Theatre. It appeared to me that the Court

(b) 2 J. Wilson's C. C. 157.

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could enforce that Agreement by restraining him from writing for any other Theatre. The Court could not compel him to write for the *Haymarket* Theatre; but it did the only thing in its power, it induced him, indirectly, to do one thing by prohibiting him from doing another. There was an express Covenant on his part, contained in the *Articles of Partnership*. But the terms of the prayer of this Bill do not solve the difficulty; for, if this Contract is one which the Court will not carry into execution, the Court cannot, indirectly, enforce it by restraining Mr. *Price* from doing some other act." His Lordship then proceeds to observe upon the express terms of the Contract, and says that he will not, in that case, interfere to enforce an implied, negative stipulation; for that is the utmost that can be made of his Lordship's observations in that Case.

For the reasons which I have stated, I am of opinion that, if this Cause were now being heard, and the Agreement were admitted to be such as it appears to be, this Court could not make any Decree, but must dismiss the Bill.

I should be extremely unwilling to have it thought that I am setting my judgment in opposition to any express opinion of The *Lord Chancellor*'s. I have always thought it to be the duty of a Judge of this Court, knowing the opinion upon any point expressed by The *Lord Chancellor*, to follow it, as the immediate consequence of not following it, would be an appeal to him. It does not however appear that the attention of The *Lord Chancellor* was particularly called to this point. The application was an application *ex parte*; and, therefore, I may, without impropriety, say that my opinion is that this Injunction ought to be dissolved.

*Saltman v. Society for Diffusion of Useful Knowledge. 9. L. 393.
 Dickinson v. Webster. 2. Ch. 52. Hill v. Lockett. 2d. 60.
 Wells v. Wells. 15. Am. W. Smith v. Mules 9. Hare 567.*

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 28th January.

*Agreement.
 Specific
 Performance.
 Injunction.*

Where a Party agrees not to do a particular Act, and there are other Terms in the Agreement which are so vague that the Court cannot enforce them, it will not grant an Injunction to restrain the breach of the negative Term.

The Court will not give any assistance to a Party seeking to enforce a hard Bargain.

*Saltman v. Society for Diffusion of Useful Knowledge. 9. L. 393.
 13. L. 393.
 1d. 243.*

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THE Bill stated that the Plaintiffs carried on the business of Factors and Merchants, in co-partnership, at Birmingham: that on the 27th of January 1834 they took into their employment the Defendant *Jennings*, as their Clerk, upon the terms and conditions after mentioned; and, thereupon, the Plaintiffs and the Defendant duly made and executed an Agreement, dated the 27th of January 1834, and which was as follows: "The said *John Richards Jennings*, for the considerations hereinafter mentioned, doth hire himself to the said *James Kimberley* and *William Kimberley*, and the Survivor of them, and he doth hereby undertake and agree that he will serve them and the Survivor of them, for the term of Six Years, to commence and be computed from the day of the date of these Presents, and work for and be employed by and in the name and on the behalf of the said *James Kimberley* and *William Kimberley* and the Survivor of them, in the capacities of a Clerk, Traveller and Bookkeeper, in the trade or business of Factors now carried on by the said *James Kimberley* and *William Kimberley*, in Birmingham aforesaid, and in obtaining orders for and selling all sorts of Goods, Wares, Merchandize and Commodities belonging thereto, and receiving the prices for the same, as they the said *James Kimberley* and *William Kimberley* or the Survivor of them, shall order and direct, and, in so doing, shall and will employ all his best services and attentions at all times, and shall and will enter and make just and true accounts, in the books of the said *James*

*overruled
 Dunlop v. Lyster
 1. 2d. 5. 12
 at 5. 684*

Kimberley and William Kimberley, of all Goods, Wares, Merchandizes and Commodities bought and sold, Money, Bills of Exchange and Promissory Notes received and paid, and of all other things whatsoever relating to the said trade or business which shall come or be committed to his care, management or disposal, and from time to time, remit, pay and deliver the Money, Bills of Exchange and Promissory Notes of or belonging to the said *James Kimberley and William Kimberley* or the Survivor of them, and make, render and give, fair and true accounts of all orders taken by him and of all actings and doings in or relating to the said trade or business, to the said *James Kimberley and William Kimberley* or the Survivor of them, when and so often as he shall be thereunto requested, and also shall not nor will, during the said term of Six Years, work for, or for the use or benefit of, or be otherwise engaged or employed by any other Person or Persons other than the said *James Kimberley and William Kimberley*, or the Survivor of them, in the capacities aforesaid, or in any other Trade, Business, Profession or Employment whatsoever, without the licence or consent of the said *James Kimberley and William Kimberley*, or the Survivor of them, in writing, under their or his hands or hand, for that purpose, first had and obtained: and the said *James Kimberley and William Kimberley*, for and in Consideration of the service of the said *John Richards Jennings* and the performance of the Agreements of the said *John Richards Jennings* herein contained, do and each of them doth, hereby, agree with the said *John Richards Jennings*, that they the said *James Kimberley and William Kimberley*, and the Survivor of them shall and will, from time to time during the said term of Six Years, well and truly pay or cause to be paid, to the said *John*

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Richards Jennings, the Salary or Wages following, that is to say, during the first two years of the said Term, the Salary or Wages of 150 l. per annum, during the third and fourth Years of the said Term, the Salary or Wages of 160 l. per annum, and, during the fifth and last years of the said Term, the Salary or Wages of 200 l. per annum, without any deduction or abatement whatsoever out of the said respective yearly Sums or Wages, save and except such as shall be made by virtue of these Presents; and, also, shall and will, from time to time during the said term of Six Years, well and truly pay or cause to be paid, unto the said *John Richards Jennings*, all reasonable, usual, and necessary travelling Expenses. Provided that, in case the said *John Richards Jennings* shall, during the said term of Six Years, become and be incapable, from illness or indisposition, of serving the said *James Kimberley* and *William Kimberley* or the Survivor of them, in the capacities aforesaid or otherwise in the said Trade or Business according to the true intent and meaning of these Presents, or shall absent himself from or neglect the service of the said *James Kimberley* and *William Kimberley*, without their, or one of their, licence and consent, in writing, under their, or one of their hands or hand, for that purpose, first had and obtained, then, and in either of the said Cases, it shall be lawful for the said *James Kimberley* and *William Kimberley* and the Survivor of them, wholly and absolutely to dismiss and discharge the said *John Richards Jennings* from their service, and to discontinue the payment of the said Salary or Wages from thenceforth, or else, at their or his own option, so often as the same respectively shall happen, it shall and may be lawful, for the said *James Kimberley* and *William Kimberley* or the Survivor of them, to retain the said Sum or

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Wages, or deduct a proportionate part thereof, for the time that such incapacity or absence or neglect, as the case may be, shall endure, to and for their own use and benefit. Provided always, and it is hereby understood agreed and declared, between and by the said Parties hereto, that, *at the end of the said term of Six Years, the said Parties hereto shall be and become Partners, in the said Business, upon such Terms, Conditions and Restrictions as shall be mutually agreed upon by the said James Kimberley and William Kimberley and John Richards Jennings.* The Bill then stated that, for some time after the Agreement was made, the Plaintiffs employed the Defendant to travel for them, in various parts of the Country, in the way of their Business, in selling and obtaining orders for Goods and Merchandizes in which they dealt, and in receiving Monies for the same, subject, however, to such directions as the Plaintiffs thought proper, from time to time, to give him: that the Defendant having been in the employ of the Plaintiffs nearly twelve months, had become acquainted with their mode of dealing and the manner in which they transacted their Business, and became acquainted with their Customers on the different Roads or Journies whereon they had employed him, and it was, therefore, desirable that they should, if possible, continue him in the discharge of his allotted Duties: that, on the 8th of January 1835, the Plaintiffs and Jennings met at *Birmingham*, and Jennings expressed his desire, to the Plaintiffs, to procure some better terms as to the promised Partnership with them, and pressed them to specify what proportion of the Trade he should have; but the Plaintiffs then refused to comply with such request, and informed the Defendant that that subject must be left for arrangement when the term of his servitude under the Articles of Agreement,

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should expire, and would depend upon his conduct and other circumstances in the meantime : that the Defendant left the Plaintiffs without coming to any terms, but, on the following day, returned and informed them that he only wanted a Memorandum saying that he should have an Interest in the Trade on the expiration of his servitude : that the Plaintiffs, with the view of reconciling the Defendant to the due discharge of his Duty, and to obviate the inconvenience that would arise from the suspension of his Services, were induced, on the 9th January 1835, to sign and give to the Defendant the following Memorandum :

“ We hereby undertake to give our Traveller, *John Richards Jennings*, a future Share in the Profits of our Trade, as soon as he shall have completed the Terms of his Engagement with us, being in consideration (in addition to his Salary) of his Services during his Engagement.” The Bill then alleged that the Defendant, in his subsequent dealings with the Plaintiffs’ Customers, greatly relaxed in his diligence and efforts to serve the Plaintiffs ; and, on that account, they, in October 1835, deemed it expedient to employ him, as a Clerk and Bookkeeper, in their Counting-house, instead of sending him on Journies ; but he refused to be so employed, and quitted their Service, on the 6th November 1835, without their consent : that the Plaintiffs always had been, and still were ready to perform their parts of the Agreements of January 1834 and January 1835 : that the Defendant had lately commenced Business, as a Factor and General Merchant, in *Birmingham*, in opposition to the Plaintiffs and contrary to the true intent and meaning of the first Agreement ; and threatened to engage himself with other Factors and Merchants, and to act

for them as their Traveller, either separate from or in addition to the said Business on his own account. The Bill prayed that the Defendant might be restrained, by the Decree of the Court, and, in the meantime, by the Order of the Court during the remainder of the term of Six Years mentioned in the first Agreement, from working for or for the use or benefit of, or otherwise being engaged or employed by any other Person or Persons than the Plaintiffs, in the capacities in that Agreement mentioned, or in any other Trade, Business, Profession or Employment whatsoever, without the consent of the Plaintiffs, and, in particular, from carrying on the Trade which he was then carrying on, the Plaintiffs being ready and willing and thereby offering to perform the two Agreements on their parts.

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The Defendant demurred for want of Equity.

Sir *William Horne* and Mr. *Hayter*, in support of the Demurrer :

First: The Agreement is a mere Contract for Hiring and Service at a Salary, and is utterly unconnected with any existing Partnership. The Defendant was, simply, the hired Servant of the Plaintiffs. They offer to perform the Agreement on their parts. The Bill, therefore, is a Bill for the Specific Performance of a Contract. But a Contract for Personal Service, cannot be made the subject of Specific Performance, unless it can be shown to have the features and character of a Partnership. If the Defendant has violated the Contract, the Plaintiffs have an adequate remedy at Law. It is true that the Agreement provides for a future Partnership ; but, if the allegations in the Bill are true, the Defendant has violated the Contract, and, consequently, he can never compel the

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Plaintiffs to admit him into Partnership. *Morris v. Colman* (a), *Kemble v. Kean* (b), *Flint v. Brandon* (c). Secondly: The Terms of the Partnership are not specified. At the end of the Six Years, the Parties are to become Partners on such terms as *shall be* mutually agreed upon between them. If, at the end of the Six Years, the Defendant were to file a Bill to compel a Specific Performance of the Agreement, the Court would say that it could not compel a Specific Performance of that which could not be specifically defined. There is, therefore, no mutuality between the Parties. *Underwood v. Hitchcox* (d), *Flight v. Bolland* (e). Thirdly: The Injunction is merely an auxiliary remedy; and, if the Plaintiffs have not a right to come into this Court in respect of the Contract, they have no right to the Injunction. The negative Contract is merely subsidiary to the positive Contract: the Court will not enforce the latter, unless it can enforce the former. Lastly: The Agreement is illegal and void, as being against public policy: for it contains a Stipulation that the Defendant shall not, during the term of Six Years, be employed in any part of the World, by any other Person than the Plaintiffs, in the Capacities specified, or in any other Trade, Business, Profession or Employment. *Mitchel v. Reynolds* (f).

Mr. Knight and Mr. G. Richards, in support of the Bill:

The Bill is not filed, simply, for the Specific Performance of an Agreement for the hiring of a Servant, but

(a) 18 Ves. 437.

(b) *Ante*, p. 333.

(c) 8 Ves. 159.

(d) 1 Vez. 279.

(e) 4 Russ. 298.

(f) 1 P. W. 181.

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to restrain the Defendant from breaking a negative Covenant, by which he has bound himself not to work or carry on any Trade or Business, during a certain period, for any other Persons than the Plaintiffs. It is a question of serious Fraud upon Trade. Large Mercantile Houses are under the necessity of employing Agents to take Orders for them. Great confidence must be reposed in such Agents; and they have the means, if so disposed, of abusing that confidence, by undermining their Employers, and ingratiating themselves with their Customers. If an Agent, in breach of his Contract, converts to his own purposes, the secrets of his Employers and the knowledge he has acquired in their service, an Equity immediately arises to the Employers. *Yovatt v. Winyard* (g); *Green v. Folgham* (h); *Cholmondeley v. Clinton* (i). It is a different question whether this Court can enforce an Agreement, and whether it will prevent the doing of an act which is a plain violation of the Contract. Independent of Specific Performance, there is a right to relief here. In *Morris v. Colman* there was both an affirmative and a negative Contract. Lord *Eldon* did not found his Judgment, in that Case, on the ground of Partnership: and, when he mentions that Case in *Clarke v. Price*, he does not speak of it as a Case of Partnership. He merely alludes to the Partnership by way of description of the Case.

[The VICE-CHANCELLOR:—*Morris v. Colman*, from the beginning to the end, was treated as a Case of Partnership. *Colman* insisted, on the footing of the Agreement that constituted the Partnership, that he was

(g) 1 J. & W. 394.

(h) 1 Sim. & Stu. 398.

(i) 19 Ves. 261.

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entitled to be the Manager of the Theatre to the exclusion of *Morris*, and, therefore, he was insisting on the existence of the Agreement.]

According to what Lord *Eldon* says in *Clarke v. Price*, if there had been a negative Covenant in that Case, it would have been enforced. It is settled, by repeated Decisions, that the Court will interfere negatively, where it cannot interfere positively; as in the Case of *The Glamorganshire Canal Company* (k). So this Court will interfere to prevent the breach of a Covenant not to carry on trade within certain limits; though there may be other parts of the same Covenant which it cannot enforce. The negative Covenant in this Case, is a separate and independent Covenant, belonging to the introduction into the service. It is altogether collateral to the Covenant to serve for a given time. It does not, of necessity, follow from the affirmative Contract, nor are the two Covenants so connected together, that, if the Court cannot interfere as to one, it will not interfere as to the other. Suppose that the Defendant had been discharged for misconduct, would he then have been entitled to disclose all the secrets of his Employers?

Next: Is the negative Covenant such a restraint of Trade as to be void? In *Mitchel v. Reynolds*, the Court said that if a reason could be shown for the Restriction, it should prevail (l). Here the Contract is that the Defendant should not, during the term, be employed by any other Persons: it had reference to the

(k) 1 Myl. & Keen, 154. See also *Rankin v. Huskisson*, ante, Vol. IV. p. 13.

(l) See 1 P. W. 192, 193.

mastery he would obtain over the secrets and connections of his Employers, and, therefore, there was a reason for it.

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The Injunction may, at all events, be granted in a more limited form than it is prayed, that is to say, to restrain the Defendant from availing himself of the knowledge which he has obtained of the connections and secrets of his Employers. Damages at Law would be an inadequate remedy; for, by disclosing the secrets of the Plaintiffs, an irreparable injury would be done to them.

The VICE-CHANCELLOR :

It does not clearly appear to be the meaning of the Agreement, that, if the event happened that the Defendant did not continue, during the whole term of Six Years, in the Service of the Plaintiffs, he should be disabled from engaging in any other Service or Employment for the remainder of the term. It has been assumed, in the course of the Argument, that this part of the Agreement is to be taken by itself, and that, whatever might happen during the term, the Defendant should not engage in any other Employment. But, attending to the whole of the Agreement, the true Construction of it seems to be that, during such portion of the term as the Defendant should continue in the Service of the Plaintiffs, he should not enter into any other Employment; but, if he should be dismissed during the term, then that he might engage himself in the Service of other Persons. Supposing, however, the meaning of the Agreement to be such as I have stated it to be, still it would afford a strong reason against the interference of the Court; for it would be what is commonly termed

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a Hard Bargain; inasmuch as the Agreement is so constructed that if, from illness or any other cause over which the Defendant could have no control, he should become incapable of serving the Plaintiffs, they have the option either of discharging him, or discontinuing the payment of his Salary, and insisting that, for the remainder of the Six Years, he shall not engage in the Service of any other Individual. Nothing could be more harsh towards a young Man dealing with great Traders, than that he should be allowed to enter into an Agreement, which placed him so entirely in their power. And, although events have happened which have precluded the Plaintiffs from availing themselves of this harsh Stipulation, still I must look at the Agreement as it was originally concocted, in order to see whether, on the whole, it was such as this Court would countenance.

Then, at the end of the Agreement, there is this Stipulation, that, at the end of the term of Six Years, the parties should become Partners upon such Terms, Conditions and Restrictions as should be mutually agreed upon between them. This was an essential and important part of the Agreement, and was so considered by both Parties; and, although the Performance of it was to depend on the Defendant's good Conduct, and the Terms of the Partnership were to be subsequently arranged, it is plain that he so considered it, from his having expressed his desire to the Plaintiffs, at the meeting between them on the 8th January 1835, to procure some better Terms as to the promised Partnership, and from his having pressed them to specify what Proportion of the Trade he was to have, and, further, from his having, on the following day, obtained from them the second Agree-

ment, in which they again held out to him the prospect of a future Partnership. The whole of the Agreement must be taken together ; and, though that portion of it which relates to the Partnership, is so vague and loose that the Court cannot execute it, still it is evident that the Defendant was looking forward to the time at which he should have a Share of the Profits ; and this Court is not at liberty to say that that Portion of the Agreement on which it cannot act, shall be rejected, and that the other part, on which it can act, shall be retained.

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2. *A. 58*

It is observable that the Bill represents that the Plaintiffs are ready and willing to perform the Agreement on their parts, but it does not ask for a Specific Performance : and it is obvious that, if the Plaintiffs were required, by the Defendant, to admit him into Partnership, they might insist on such Terms as would render it impossible that they ever should become Partners. The Plaintiffs however, by this offer, show that, in their view, the Stipulation at the end of the Agreement, was material, though they might act in such a way as that, virtually, they should not be bound by it.

Then it was said that the Court might execute a negative Contract. I admit it. I remember a Case in which a Nephew wished to go on the Stage, and his Uncle gave him a large sum of Money in consideration of his covenanting not to perform within a particular District ; the Court would execute such a Covenant, on the ground that a valuable Consideration had been given for it. But here the negative Covenant does not stand by itself : it is coupled with the Agreement for Service for a certain number of Years, and then for taking the Defendant into Partnership.

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In the first place, this Agreement cannot be performed in the whole, and therefore, this Court cannot perform any part of it; in the next place, it is not to be construed as the Plaintiffs contend for: and, lastly, it is a Hard Bargain, and, therefore, this Court will not interfere.

Demurrer allowed.

THE Plaintiffs had filed a similar Bill against another of their Travellers, named *Yeo*, to which he also demurred.

Mr. *Jacob* and Mr. *Sharpe* appeared in support of that Demurrer; but, as it depended on the same Principle as the former it was allowed without Argument.

1833;
 1st November.

Witness.
Re-examination.
Practice.

Liberty given to the Plaintiff to re-examine one of his Witnesses to part of an Interrogatory as to which the Examiner had omitted to take down the Deposition.

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THE Examiner having omitted to take down the Deposition of one of the Plaintiff's Witnesses to part of the Twentieth Interrogatory, the Plaintiffs now moved that the Witness might be at liberty to attend the Examiner for the purpose of being re-examined upon so much of that Interrogatory as was in the following words: "What passed at each and every of such Meetings, or at such Meeting at which you so attended, and, in particular, did or not the said Defendant *James Southby Bridge* produce any, and, if any, what Accounts or Account at such Meetings, or at any or either and which of them, or at such Meeting;" or that the Plaintiffs might be at liberty to exhibit a fresh Interrogatory

for the examination of the Witness upon the Matters inquired after by the part of the Twentieth Interrogatory before set forth, with liberty for the Defendants to cross-examine the Witness on such Matters or otherwise as the Court should think fit; and that the Examiner might re-examine the Witness upon the before-mentioned part of the Twentieth Interrogatory, or examine her upon such fresh Interrogatory accordingly; and that, in the meantime, the Cause might stand adjourned, with liberty for the Plaintiffs to apply to have the same again put in the Paper for hearing.

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The Motion was supported by an Affidavit made by the Plaintiff's Solicitor and the Witness, setting forth the whole of the Twentieth Interrogatory and the Deposition thereto as delivered out by the Examiner, and adding that, before the Suit was instituted, the Witness communicated to the Solicitor what passed at the several Meetings mentioned in her Answer to the Twentieth Interrogatory as delivered out by the Examiner; and that, after the Suit had been instituted, and on the occasion of the Solicitor's preparing for Counsel the Instructions for Interrogatories for the Examination of the Plaintiff's Witnesses, he again communicated with the Witness as to what passed at those Meetings, and that the Witness then again stated to him what passed thereat: that those Statements were embodied in the Instructions for the Interrogatories: that upon the day on which the Witness was examined as a Witness on the part of the Plaintiffs on the said Twentieth Interrogatory, she was also examined, as a Witness on the part of the Plaintiffs on various other Interrogatories, and that, upon her being so examined upon the said Twentieth Interrogatory, she answered that part of it which

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was set forth in the Notice of Motion, and stated what passed at the several Meetings thereby inquired after, and deposed to the question whether Accounts had or not been produced by the Defendant *J. S. Bridge* thereat, and that she intended that such Statement and Deposition should be, and, at the time of her Examination, she fully believed that the same had been taken down as part of her Deposition to the Twentieth Interrogatory: that, at the close of her Examination, the Examiner read over to her her Answers to all the Interrogatories on which she had been examined, but that the Interrogatories were not then read over to her; that she directed her attention to the correctness of the Answers and did not then observe that her Answer to the part of the Twentieth Interrogatory before set forth, was not contained in what was read over to her: that she had read over her Depositions as contained in a Paper purporting to be an office-copy of the Depositions taken on the part of the Plaintiffs, (and which the Solicitor stated to be a correct copy of those Depositions,) and that her Answer to the before-mentioned part of the Twentieth Interrogatory, was not contained in any part of those Depositions, but, as she believed, had been omitted by some accident or inadvertence of the Examiner: that, after Publication had passed, the Solicitor, on reading the Depositions, discovered that they contained no Answer to the before-mentioned part of the Twentieth Interrogatory, and that he thereupon caused a Communication to be made, to the Witness, upon the subject, to which she replied that she had answered the whole of the Twentieth Interrogatory: that the Witness was the only person who could have been examined as to what passed at the Meetings, and that the Solicitor verily believed that, if she were re-examined on the part of

the Twentieth Interrogatory before set forth, her Answer thereto would furnish very material Evidence for the Plaintiffs.

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Mr. *Knight* and Mr. *Turner* supported the Motion ; Mr. *Pepys* and Mr. *Koe* opposed it.

The following Cases were cited in support of the Motion : *Griells v. Gansell* (a), *Rowley v. Ridley* (b), *Ingram v. Mitchell* (c), *Kirk v. Kirk* (d), *Shaw v. Lindsey* (e), *Abergavenny v. Powell* (f), *Cox v. Allingham* (g).

The *Vice-Chancellor* ordered that the Plaintiffs should be at liberty to examine the Witness to the part of the Twentieth Interrogatory set forth in the notice of Motion, and that the Defendants should have liberty to cross-examine the Witness ; that Publication should pass immediately after the examination or cross-examination (if any) should be concluded ; and that the Cause should be adjourned, with liberty to the Plaintiffs to apply to have it restored to the Paper, when the Publication should have passed.

(a) 2 P. W. 646.

(e) 15 Ves. 380.

(b) 1 Cox, 281.

(f) 1 Mer. 130.

(c) 5 Ves. 297, *see* 299.

(g) Jac. 337, *see* 339.

(d) 13 Ves. 280.

ANSDELL *v.* WHITFIELD.

1835:
9th Dec.

Practice.
Contempt.
Construction of
11 G. 4 & 1 W. 4,
c. 36.

The 14 Days
mentioned in
11 G. 4 & 1 W. 4,
c. 36, s. 11,
are exclusive of
the first and in-
clusive of the
last Day.

MR. KNIGHT, on moving that a Clerk in Court might be appointed to enter an Appearance for the Defendant, under 11 Geo. 4, and 1 Will. 4, c. 36, s. 11, said that the question was, whether the 14 Days after Notice given to the Defendant to enter an Appearance, were to be reckoned exclusively or inclusively of the Day of serving the Notice.

The *Vice-Chancellor* said that they were to be reckoned exclusively of the first and inclusively of the last Day.

1833:
8th Nov. and
10th Dec.

Pleading.

Defendant
pleaded, to the
whole Bill, that
he was a Pur-
chaser for Valu-
able Considera-
tion, without
Notice, and, by
Answer in sup-
port of the Plea,
denied the
Charges of No-
tice. Held that
the Answer
over-ruled the
Plea.

LORD PORTARLINGTON *v.* SOULBY.

THIS was a Bill by the Acceptor against the Indorsee of a Bill of Exchange, to have the Bill delivered up to be cancelled, on the ground that it had been given by the Plaintiff to secure Money lost at play to the Drawer, who had indorsed it to the Defendant, without Consideration, after it was due, and with Notice of the circumstances under which it had been accepted.

The Defendant pleaded, *to the whole Bill*, that he was a *bonâ fide* Purchaser of the Bill of Exchange, for Valuable Consideration, without Notice of the circumstances under which it had been accepted; and, "for better supporting" the Plea, he put in an Answer denying that the Bill was indorsed to him after it had be-

come due, or that he had Notice of the circumstances under which it was alleged to have been accepted. But the Answer did not notice the Allegation, in the Bill, that the Defendant had, in his custody, Books, Papers, &c. from which the truth of the matters contained in the Bill would appear: and, on that account, The *Vice-Chancellor* over-ruled the Plea, holding that it was incumbent on the Defendant to give all the Discovery sought by the Bill, relating to the subject matter of the Plea.

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TON
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His *Honor*, however, gave the Defendant leave to plead *de novo*.

The Defendant, accordingly, put in another Plea and Answer, to the same effect as the former, and denying the Allegation omitted to be noticed in the former Answer.

Mr. *Knight* and Mr. *Sidebottom*, in support of the Plea, said that a Court of Equity would not give its assistance against the holder of a Security for Valuable Consideration, who denies Notice of any of the circumstances affecting its validity.

Mr. *Pepys* and Mr. *Bagshawe*, in support of the Bill:

The Plea is wrong in Form. The Defendant, instead of pleading to the whole Bill, ought to have excepted from it so much as avoids the Bar, and then pleaded the Bar and denied, by Answer, the parts excepted. The Answer over-rules the Plea.

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Mr. *Sidebottom*, in reply, referred to Mitf. 199. Gilb., For. Rom. 57. *Bayley v. Adams (a)*, *Edmundson v. Hartley (b)*.

The VICE-CHANCELLOR:

The Plea is wrong in point of Form. It ought to have been a Plea to all the Relief and to all the Discovery sought by the Bill, except certain parts, and to those parts there ought to have been an Answer in support of the Plea. You cannot plead and answer to the same matter.

Plea ordered to stand for an Answer, with liberty to except.

(a) 6 Ves. 586.

(b) 1 Anstr. 97. See Mitf. 3d edit. 195 to 218. See also Wigram's Points in the Law of Discovery, 37. 172.

1833:

15th Nov.

Will.
Construction.
Cross
Remainders.

ASHLEY v. ASHLEY.

BY an Order in this Cause, the *Master* was directed to inquire and state, at the expense of the Estate of *Sarah Ashley*, the Widow of the Testator in the Cause, what Interest the Testator had in a certain Estate in *Friday-street* in the City of *London*. The *Master* found Testator devised an Estate to *A.* for Life, Remainder to Trustees to preserve, &c., Remainder to all the Children of *A.*, as Tenants in Common, and not as Joint Tenants, and, for want of such Issue, to *B.* for Life, Remainder to Trustees to preserve, &c., Remainder to all the Children of *B.* as Tenants in Common, and not as Joint Tenants, and for want of such Issue, to *C.* in Fee. Held that the Children of *A.* took Estates for Life, with Cross Remainders between them, for Life, with Remainder to *B.* for Life, with Remainder to her Children, as Tenants in Common, with Cross Remainders between them for Life, with Remainder to *C.* in Fee.

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that *James Lewer* being seised of the Inheritance of the Estate, in Fee Simple in possession, by his Will dated the 31st of August 1773, and duly executed and attested, gave and devised his two Freehold Houses in *Friday-street* in the City of *London*, to *John Gamon* and *Thomas Holehouse*, and their Heirs, upon Trust to and for the use and behoof of his Wife, *Mary Lewer*, and her Assigns for her Life, without Impeachment of Waste, and, from and after the determination of that Estate by Forfeiture or otherwise, to the use of *Gamon* and *Holehouse* and their Heirs, for the Life of his said Wife, in Trust to preserve the Contingent Uses and Estates thereafter limited; and, from and after the decease of his said Wife, in trust to and for the use of his Daughter, *Sarah Chandler*, (Wife of *Thomas Chandler*) and her Assigns for her Life, without Impeachment of Waste; and, from and after the determination of that Estate, to the use of the Trustees and their Heirs for the Life of *Sarah Chandler*, in Trust to preserve, &c., but nevertheless to permit and suffer his Daughter *Sarah Chandler* and her Assigns, notwithstanding her coverture, and whether she should be sole or covert, during her Life to receive the Rents, Issues and Profits thereof to her and their own use, and to make Entries and bring Actions for non-payment thereof as occasion should require, and, from and after the decease of *Sarah Chandler*, in Trust and to and for the use of all and every the Child or Children lawfully begotten or to be begotten on the body of *Sarah Chandler*, equally to be divided between them, if more than one, share and share alike, and to take as Tenants in Common and not as Joint Tenants: and, for want of such Issue of *Sarah Chandler*, then in Trust and to and for the use of his Daughter *Mary Hand* (Wife of *Clayton Hand*) and her Assigns for her Life, without

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Impeachment of Waste, and, from and after the determination of that Estate, to the use of the Trustees and their Heirs during the Life of *Mary Hand*, in Trust to preserve, &c., but nevertheless to permit and suffer the said *Mary Hand* and her Assigns, notwithstanding her coverture, and whether she should be sole or covert during her Life, to receive the Rents, Issues and Profits thereof to her and their own use, and not to be subject to the Debts, Power or Control of her then or any future Husband, and to make Entries and bring Actions for nonpayment thereof as occasion should require; and, from and after the decease of *Mary Hand*, in Trust, and to and for the use of all and every the Child and Children lawfully begotten or to be begotten on the body of *Mary Hand*, equally to be divided between them, if more than one, share and share alike, and to take as Tenants in Common and not as Joint Tenants, and, for want of such issue of *Mary Hand*, then in Trust, and to and for the use and behoof of *Thomas Chandler* the Husband of *Sarah Chandler*, his Heirs and Assigns for ever. And the Testator, after giving several Legacies, gave, devised and bequeathed all the rest, residue and remainder of his Real and Personal Estate and Effects, of what nature, kind or quality soever, or wheresoever, unto his Wife, *Mary Lever*, her Heirs, Executors, Administrators and Assigns for ever.

James Lever died soon after the date of his Will, leaving his Wife *Mary Lever*, and his two Daughters *Sarah Chandler* and *Mary Hand* him surviving, all of whom died long before the date of the Report.

Sarah Chandler had Issue, by *Thomas Chandler*, eight Children living at the time of the decease of the

Testator *James Lewer* or born afterwards, (that is to say) *Thomas Chandler, Edward Chandler, Harriet Chandler, Thomas James Chandler, Sarah* the late Widow of *General Christopher Ashley*, the Testator in the Pleadings named, *Mary Ann* the Widow of *Edward Butler*, the Plaintiff *Sophia* the Wife of the Plaintiff *David Power*, and *Matilda* the Wife of *Charles Lane*. Some of those Children were living at the date of *J. Lewer's* Will. *Thomas, Edward, Harriet* and *Thomas James*, died sometime since Infants; and *Sarah Ashley* died without Issue on the 16th of December 1827, but *Mary Ann Butler, Sophia Power*, and *Matilda Lane* were still living.

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There were five Children of *Mary Hand* living at *J. Lewer's* decease or born since his death, but three of them only were still living.

The *Master* reported that all the Limitations in the Will failed, subsequent to the Devise to the Child or Children of *Sarah Chandler*, as being only to take effect in case there never was any such Child; and that the Children of *Sarah Chander* took Life Estates only without Cross Remainders between them; and that, subject thereto, the Fee Simple of the Houses passed, by the general Residuary Devise, to the Widow of *James Lewer*, the Testator.

Mr. and Mrs. *Power* excepted to the Report, insisting that none of the Limitations in the Will had failed, but that, according to the true construction of the Will, all the Children of *Sarah Chandler* took Estates in Tail General, in Remainder Expectant on the determination of the Life Estate of *Sarah Chandler*, as Tenants in Common with Cross Remainders in Tail General between

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them; or else that all the Children of *Sarah Chandler*, took Estates for Life, in Remainder Expectant on the determination of the Life Estate of *Sarah Chandler*, as Tenants in Common, with Cross Remainders, for Life, between them; and that, subject thereto, the Testator's Daughter, *Mary Hand*, took an Estate in Remainder in the Premises, for her Life, with Remainder to the Trustees, during her Life, upon Trust to preserve the Contingent Remainders thereafter limited, with Remainder to all and every the Children of *Mary Hand*, as Tenants in Common for Life or in Tail, with Cross Remainders for Life or in Tail amongst them, with Remainder to the use of *Thomas Chandler*, his Heirs and Assigns for ever.

The Parties having agreed to be bound by the decision of the Court :

Mr. *Knight* and Mr. *Daniell*, in support of the Exception, said that it would be difficult to contend that the Children of Mrs. *Chandler* took Estates of Inheritance, but that they took, at least, Estates for Life with Cross Remainders; that the words, "for want of such Issue," meant the same as, "for default of such Issue;" that there was no Case that decided that Cross Remainders could not be implied between Tenants for Life; and that it was clear that the Testator did not intend his Estate to go over, till all the Children of Mrs. *Chandler* were dead. *Doe v. Webb* (a); *Armstrong v. Eldridge* (b); *Doe v. Abey* (c); *Tuckerman v. Jefferies* (d).

(a) 1 Taunt. 234.

(b) 3 Bro. C. C. 215.

(c) 1 M. & S. 428.

(d) 4 Bac. Ab. 467. Dodd's edit.

Mr. *Pepys* and Mr. *Ching*, for Persons claiming under Mrs. *Lever*, the Residuary Devisee, in support of the Report, said that the Gift over to Mrs. *Hand*, was not to take effect after the deaths of the Children of Mrs. *Chandler*, but for want of such Children; that the Testator was contemplating a Gift to Persons who were to stand in the place of those whom he intended originally to benefit; and that, by the words: "to take as Tenants in Common and not as Joint Tenants," he had expressly excluded a Joint Tenancy.

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v.
ASHLEY.

THE VICE-CHANCELLOR:

My opinion is directly against the finding of the *Master*.—[His *Honor* here read the Devise, and then proceeded thus:]—Now but one subject is given throughout. The expression: "for want of such Issue," means want of Issue whenever that event may happen, either by there being no Children originally, or by the Children ceasing to exist. Those words seem to me to create Cross Remainders by implication (e).

Declare that the Children of Mrs. *Chandler* took Estates for Life, as Tenants in Common, with Cross Remainders between them for Life, with Remainder to Mrs. *Hand* for Life, with Remainder to her Children, as Tenants in Common for Life, with Cross Remainders between them for Life, with Remainder to *Thomas Chandler* in Fee: and refer it back to the *Master* to review his Report.

(e) See *Green v. Stephens*, 12 Ves. 419, and 17 Ves. 64.

1833 :
19th Nov.

*Purchaser.
Legacies.*

Testator devised his Estates charged with Debts and Legacies. The Devisee mortgaged the Estate to *A.*, subject, expressly, to the Legacies. *A.* having called in his Money, and the Devisee requiring a further advance, they join in mortgaging the Estate to *B.*, but not expressly subject to the Legacies, and *B.* is informed, falsely, by the Devisee, that all the Legacies had been paid. Held that *B.* took the Estate subject to the Legacies.

ROGERS v. ROGERS.

THOMAS ROGERS, by his Will dated the 6th of June 1794, after directing that his just Debts, Funeral Expenses, and the Charges of proving his Will, should be paid by his Executrix thereafter named, gave, devised and bequeathed unto *John Yeomans* and *Peter Grevonor* all his Freehold Messuages, Lands, Hereditaments and Premises in the Parishes of *Wellington* and *Burg-hill* in the County of *Hereford*, together with the Stock, Crop, Implements of Husbandry, Household Goods and Furniture, Monies, and Securities for Money, and all other the Personal Estate, of what nature or kind soever, which he might die possessed of or entitled unto, to hold unto the said *John Yeomans* and *Peter Grevonor*, their Executors and Administrators, upon Trust to permit and suffer his Wife, *Elizabeth Rogers*, to receive the Rents and Profits of his said Freehold Estates, and, also, to have the use and enjoyment of all his Stock, Crop, and Implements of Husbandry, Household Goods and Furniture, Ready Money, and Securities for Money, to enable her the better to carry on the Farming Business (if she chose so to do) for her Life, and, after her decease, he gave, devised and bequeathed the same and every part thereof, unto his Son, *Thomas Rogers*, and to his Heirs and Assigns for ever, subject to the Payment of certain pecuniary Legacies, which the Testator then proceeded to give ; and, as to all the rest and residue of his said Estates and Effects, after payment and satisfaction of the aforesaid Debts, Funeral Expenses, the charges of proving his Will, and the Legacies before given and directed to be paid in manner

above mentioned, he gave and bequeathed the same unto his Son *Thomas Rogers*, his Heirs and Assigns for ever. And he appointed his Wife, *Elizabeth Rogers*, sole Executrix of his Will.

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The Testator died on the 22d of May 1798.

By Indentures of the 9th and 10th of August 1814, after reciting that *Elizabeth Rogers* and *Thomas Rogers* had sold certain parts of the Testator's Real Estates, and, with the Monies arising therefrom, had paid off certain Mortgages for Terms of Years which had been created by the Testator, and that they had prevailed on *Joseph Baker* to advance them 500*l.*, and to accept of a Mortgage, not only of the Freehold, Fee Simple and Inheritance of the Hereditaments comprised in the Terms, but also of all other Freehold Lands and Hereditaments of them the said *Elizabeth Rogers* and *Thomas Rogers* thereafter mentioned, and also an Assignment of the Terms: It was witnessed that, in consideration of the 500*l.* paid, by *Baker*, to *Elizabeth Rogers* and *Thomas Rogers*, they, together with *John Yeomans* and *Peter Gravenor*, conveyed all the Testator's Real Estates remaining unsold, to *Baker*, in Fee, subject to Redemption on repayment of the 500*l.* and Interest: and the Mortgagees assigned the Terms to *A. Andrews*, in Trust for *Baker*, his Heirs and Assigns. In the Covenant against Incumbrances contained in the Release, the Legacies given by the Will, and the Terms for Years, were excepted.

By Indentures of the 29th and 30th of August 1817, after reciting, amongst other things, that *Baker* had called in the 500*l.*, and that *Elizabeth Rogers* and *Thomas Rogers* were unable to pay the same, and that they

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ROGERS.

having occasion for the further Sum of 50*l.*, had applied to *John Holder* to advance 550 *l.*, which *Holder* had agreed to do, on having the Mortgaged Estate and the Terms conveyed and assigned to him: It was witnessed that, in consideration of the 500*l.* advanced to *Baker*, and of 50*l.* advanced to *Elizabeth Rogers* and *Thomas Rogers*, they conveyed the Mortgaged Premises to *John Holder* in Fee, subject to Redemption on repayment of the 550 *l.* with Interest: and *Andrews* assigned the Terms to *William Charles Holder*, in Trust for *John Holder*, his Heirs and Assigns. *Elizabeth Rogers* died on the 19th of January 1821, having appointed her Daughter *Mary Rogers*, who was one of the Legatees named in the Testator's Will, her Executrix.

The Bill was filed, by the Legatees, against *Thomas Rogers*, *Peter Gravenor*, *John Holder* and certain other Parties, charging that *Holder*, at the time when the Mortgage was made to him, knew that the Legacies were unpaid, and that he took the Mortgage expressly charged with the Payment of the Legacies; and praying that the Legacies might be raised and paid out of the Testator's Real and Personal Estates. *Holder*, in his Answer, denied that, at the time of the execution of the Mortgage to him, he knew or believed that the Legacies were not provided for: on the contrary, he said that he was informed, by *Elizabeth* and *Thomas Rogers*, that all the Legacies had been provided for out of the Testator's Personal Estate and by the Monies raised by the Mortgage then transferred to him, and by the before-mentioned Sales of parts of the Testator's Real Estates: that the Sums raised by such Sales and Mortgage, exceeded, in amount, the Legacies and the Testator's Debts, including his Debts by Mortgage: and he sub-

mitted that the Estates having paid and contributed the full amount of the Charges thereon, were discharged from the Legacies, and were not then liable, in his hands, to pay the same.

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The *Attorney-general* and Mr. *Whitmarsh* for the Plaintiffs, said that, as *Holder* was a Purchaser from *Baker*, he took with express Notice that the Legacies remained unpaid.

Mr. *Pepys* and Mr. *R. Roupell*, for the Defendant *Holder*, said that the Mortgage made to *Holder*, was an entirely new transaction; that he dealt with *Elizabeth* and *Thomas Rogers*, and advanced them more money than was due to *Baker*, and took from them a new Security; that the Release of 1817 contained no exception of Legacies, but, on the contrary, *Holder* was assured that all the Legacies had been provided for; that, where a Trust is created for payment of Debts as well as Legacies, a Purchaser is not bound to see to the application of his Money, unless fraudulent collusion is shown. *Rogers v. Skillicorne* (a).

Mr. *Wakefield*, Mr. *Jemmett*, Mr. *Bethell* and Mr. *Whitmarsh, jun.*, appeared for other Parties.

THE VICE-CHANCELLOR:

By the Deeds of 1817, no Interest was conveyed in any Lands except those the legal Estate in which was in *Baker*. He, by the Deeds of 1814, took a Mortgage subject to the Legacies. It may be true that, when *Holder* took a Transfer of that Mortgage, he made in-

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qu岸 whether the Legacies were paid, and was misinformed by *Elizabeth Rogers* and *Thomas Rogers*. It is recited, in the Release of 1817, that *Baker* had called in his Money, and that Application was made, to *Holder*, to advance that Sum and also a further Sum; and he takes a Conveyance, by one Deed and by one granting part, in which *Baker* conveys, and *Elizabeth* and *Thomas Rogers* release and confirm: and therefore, the Estate passed to him subject to the Legacies; for, on the face of his Conveyance, it appears that he took the same Estate as *Baker* had (b).

(b) See *Watkins v. Cheek*, 2 Sim. & Stu. 199; and *Johnson v. Kennett*, *post*.

1833:
21st Nov.

RATTENBURY v. FENTON.

Practice.
Commission to
examine
Witnesses.
New Orders.

Plaintiff obtained an Order for a Commission, but did not take it out: Held that, under the 17th Order of 1831, the Defendant was entitled to take out a Commission.

THE Plaintiff filed a Replication on the 11th of July, and, on the following day, obtained an order for a Commission to examine Witnesses, but did not take it out. On the 7th of November, the Plaintiff entered a Rule to produce Witnesses, and, on the 18th, he entered the Rule to pass Publication. The Defendant had Witnesses to examine in the Country; and, by the Rule given by the Plaintiff on the 18th, Publication would pass on the 25th, unless the Defendant enlarged it by suing out a Commission under the 17th Order of 1831.

Sir *E. Sugden*, for the Defendant, now moved for a Commission.

The *Vice-Chancellor* held the Case to be within the 17th Order and granted the Motion.

ASHTON v. MILNE.

IN 1783, *Betty Penn* and *James Eyre* were seised in Fee, as Tenants in Common, of equal Moieties of an Estate in *Lancashire*, subject to a Term of 1,000 years, which, in 1754, became vested in *Sarah Bellamy*, for securing 500 l. and Interest.

Betty Penn died in 1783, leaving her Daughters, *Hannah*, the Wife of *James Ashton*, and *Frances*, the Wife of *Samuel Ashton*, her Co-heirs.

By Indentures of Lease and Release, dated the 22d and 23d of January 1784, *James Eyre*, *James Ashton*, and *Hannah*, his Wife, and *Samuel Ashton* and *Frances*, his Wife, in consideration of 960 L., conveyed the Estate, to *John Milne*, the Grandfather of the Defendants, in Fee; and *Sarah Bellamy*, having received her Principal and Interest out of the Purchase-money, assigned the Term to *Henry Bamford*, in Trust, for *Milne*, his Heirs and Assigns, and to attend the Inheritance. The Release contained a Covenant, on the part of *James Ashton* and *Hannah* his Wife, and *Samuel Ashton* and *Frances* his Wife, to levy a Fine of the Estate to *Milne* in Fee:

1833:
24th Nov. and
3d Dec.

Mortgage.
Redemption.
Length of Time.

A. and *B.* being seised in Fee, in right of their Wives, of Two undivided Fourth Parts of an Estate, subject to a Mortgage term, joined, in 1784, with the Owner of the other Moiety, in conveying the Estate, by Lease and Release, but without a Fine, to a Purchaser in Fee, and the Mortgage was paid off, and the Term assigned to attend. The Purchaser, and those claiming under him, had

been in possession from the date of the Conveyance. *A.*'s Wife survived him, and died in 1825, leaving one of the Plaintiffs her Heir. *B.*'s Wife died in 1818, leaving the other Plaintiff her Heir. *B.* died in 1826. In 1830 the Plaintiffs brought an Ejectment, but were nonsuited by the Defendants setting up the Term. In 1831 they filed a Bill to redeem, which was dismissed, on account of the length of possession by the Defendants and those under whom they claimed.

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it did not, however, appear that the Fine was ever levied ; but *James* and *Samuel Ashton* executed to *Milne* a Bond dated the 23d of January 1784, for indemnifying him against any Claim to be made, upon the Estate, by their respective Wives, in respect of Dower or otherwise.

Milne and those claiming under him, had been in possession of the Estate ever since the execution of the Release. He died in 1802, intestate, leaving *Edmund Milne* his eldest Son and Heir-at-Law. In 1803 *Edmund Milne* conveyed the Estate to *John Milne*, the Father of the Defendants, in Fee. In 1819 *John Milne*, the Father, died, having devised the Estate to the Defendants in Fee.

James Ashton died in 1796, leaving his Wife, who afterwards married *Charles Garlick*, surviving. She survived her second Husband and died, intestate, in August 1825, leaving the Plaintiff, *James Ashton*, her eldest Son and Heir. *Frances Ashton* died in September 1818, leaving her Husband, and the Plaintiff, *Samuel Ashton*, her eldest Son and Heir her surviving. *Samuel Ashton*, the Father, died in 1826.

In 1830 the Plaintiffs brought an Ejectment against the Defendants, to recover possession of the Estate. At the Trial, which took place in August 1830, the Defendants set up the Assignment of January 1784 ; in consequence of which the Plaintiffs were nonsuited.

Bamford, having died intestate, and no person having taken out Administration to him, the Plaintiffs applied for Letters of Administration to his Estate in respect of the Term, but without success, owing to the

Defendants refusing to produce the Assignment of January 1784.

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The Bill, which was filed in January 1831, charged the Defendants, *James* and *John Milne*, with acting in concert with the other Defendant, *Abraham Milne*, the Personal Representative of *John Milne*, the Grandfather, and that the two first-named Defendants were entitled to an undivided Moiety only of the Estate; for that *Frances Ashton* and *Hannah Garlick* did not levy any Fine of the Estate, or do any act to pass their Interest therein during their Covertures; that *Frances Ashton* died in her Husband's Lifetime, and that *Hannah Garlick* did not, during the interval between her two Marriages, nor after the Death of her second Husband, make any Conveyance or Assurance of the Estate to the Defendants, *James* and *John Milne*, or to any Person under whom they claimed; that the Conveyance of January 1784, was made when *Frances* and *Hannah Ashton* were under Coverture; that, as to the Moiety of the Estate claimed by the Plaintiffs, the possession of the Defendants, *James* and *John Milne*, and those under whom they claimed, was lawful as to one-half of such Moiety, up to the Death of *Samuel Ashton* in May 1826; and that, although such Possession, as to the other half of such Moiety, ceased to be lawful on the Death of *James Ashton* the Elder, in September 1796, yet, inasmuch as the Possession by *John Milne* the Grandfather, was originally lawful, there was not any actual Disseisin, by him or those claiming under him, of *Hannah Garlick's* half of such Moiety.

The Bill prayed that an Account might be taken of what, if anything, was due upon the Security of the Mortgaged

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Premises, to the Estate of *John Milne*, the Grandfather, the Plaintiffs being ready to pay one Moiety of what should be found due; that an Account might be taken of the Rents of the Estate received by *John Milne*, the Grandfather, and that the same might be answered out of his Estate possessed by *Abraham Milne*; that the Estate might be divided between the Plaintiffs and the Defendants, *James* and *John Milne*, and that a Writ of Partition might issue for that purpose; that *Abraham Milne* might assign to the Plaintiffs, or as they should direct, one Moiety of the Estate, for the residue of the term of 1,000 years, and that the Defendants, *James* and *John Milne*, might be decreed to deliver up to the Plaintiffs the Possession of such Moiety, and that the Title Deeds might be secured for the benefit of the Parties entitled thereto: or, in case the Court should be of opinion that the Plaintiffs ought to bring an Ejectment to recover Possession of their Moiety of the Estate, then that the Defendants might be restrained from setting up the term of 1,000 years, or any other outstanding Term, so as to prevent a fair trial of the Ejectment; and that an Account might be taken of the Rents received by the Defendants, *James* and *John Milne*, and that they might pay one Moiety thereof to the Plaintiffs.

The Defendants, *James* and *John Milne*, by their Answer submitted that a good and indefeasible Title to a Moiety of the Estate was acquired by them from *James Eyre*, and that, if *James Ashton* the Elder and *Samuel Ashton* the Elder were seized of the other Moiety in the Right of their Wives, the Conveyance of 1764 passed a Fee voidable by Entry, and that the same, together with the subsequent Entry of *John Milne* the Grandfather, operated as an actual Disseisin as to that Moiety, or

that the subsequent Entries of the Parties claiming under him, operated in that manner. And the Defendants insisted on the Indentures of January 1784, and also upon the Statute of Limitations and the length of time which had elapsed since January 1784, and also since the alleged Title of the Plaintiffs was supposed to have accrued, in Bar to the Bill and the relief thereby sought, as far as they were respectively applicable thereto, and in the same manner as if they had pleaded or demurred to the Bill; and they submitted that, if either of the Plaintiffs was entitled to any Share of the Estate, the Defendants were entitled to a Lien for a like Share of the Mortgage sum of 500 *l.* and the Interest thereof.

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Sir *E. Sugden* and Mr. *Koe*, for the Plaintiffs :

The Possession of the Defendants was originally lawful; and, therefore, they never can say that they are Disseisors. The question is, what Estate passed by the Conveyance of 1784? As no Fine was levied, the Husbands conveyed only their Interest in their Marital Right and as Tenants by the Curtesy. The Persons who acquired the Interest of the Husbands, stood in their situation, and were bound to keep down the Interest of the Money due on the Mortgage. *Corbett v. Barker* (a). *Samuel Ashton*, who was Tenant by the Curtesy of one Fourth of the Estate, did not die till 1826; and, therefore, the Title of the Plaintiffs to that portion of the Estate, did not commence till that time. Besides, there was a Tenancy in Common; and the possession of one Tenant in Common, can never be adverse to the other Tenant in Common; for the possession of the one, is the

(a) 1 Anst. 138; and 3 Anst. 759.

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possession of the other. *Reading v. Royston* (b). On the trial of the Ejectment, the Defendants did not rely on Adverse Possession, but on the Term.

Mr. *Pepys* and Mr. *Walker*, for the Defendants :

James Ashton died in 1796; and *Hannah Ashton* being then discoverte, her Title to one Fourth of the Estate accrued. It is true that she married again; but that is immaterial; for the time had begun to run against her; so that the Defendants and those under whom they claim, have been holding adversely to *Hannah* and those who claim under her, ever since 1796. And, if there is a good Defence against one Co-Plaintiff, there is an end of the question. If the Plaintiff who claims through *Hannah*, is not entitled to relief, the other Co-Plaintiff cannot have any relief. *Doe v. Prosser* (c).

The relief which the Plaintiffs ask, is, first, to redeem, and, next, to prevent the setting up of the Term. The Court will not allow of Redemption, unless a clear Title to redeem be shown. The time that has elapsed, is a bar to both species of relief. If *John Milne* the Grandfather was Tenant by Sufferance, it is quite clear that, on his death in 1802, his Heir acquired an Estate in Fee by Disseisin: and, if the Possession became adverse in 1802, the Plaintiffs, or those under whom they claim, ought to have preferred their Claim in or before 1822. But we go further and say that a Conveyance by a Husband and Wife seised in right of the Wife, passes a Fee defeasible by the Entry of the Wife. Before the Statute 32 Hen. 8, c. 28, such a Conveyance would have worked

(b) 1 Salk. 242.

(c) 1 Cowp. 217.

a Discontinuance. That Statute converted the right of Action into a right of Entry.

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[The VICE-CHANCELLOR:—Have you any authority for what you state? It is new to me.]

A Lease, by a Husband, of his Wife's Lands extending beyond his Life, is voidable by the Wife after his death, but not void. *Doe v. Weller* (d).

Hannah Ashton became discoverte in 1796: there has been, therefore, a clear Adverse Possession and receipt of the Rents of her Share of the Estate, ever since that time. A party who is under disability at the time when the right to redeem accrues, must enforce that right within 10 years after the disability has ceased. The Plaintiff, therefore, who claims under *Hannah*, is clearly barred by length of time, and, if one of the Co-Plaintiffs cannot succeed, the other must fail. *Belch v. Harvey* (e), *Cholmondeley v. Clinton* (f), *Cuthbert v. Creasy* (g). If the Plaintiffs are not entitled to redeem, they cannot prevent the setting up of the Term.

Sir *E. Sugden*, in reply:

In 1784, the *Ashtons* were seised in Fee, as Coparceners, of one undivided Moiety of the Estate, and there was an existing Mortgage for 1,000 years. The persons under whom the Defendants claim, then purchased; and the Term was assigned to a Trustee, in trust to attend the Inheritance. The Husbands professed

(d) 7 T. R. 478.

(f) 4 Bligh, 1.

(e) 3 P. W. 287, note; and

(g) Ibid. 125, note.

Sugd. Vend. Appendix, No. 15.

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to convey the Fee : but an innocent Conveyance by Husband and Wife seised in right of the Wife, will not pass a voidable Fee, but only the interest of the Husband in his Marital Right and as Tenant by the Curtesy. A Lease may be a beneficial Contract for the Wife; and, therefore, she may accept it or not, as she pleases. The Husbands were bound to keep down the Interest on the Mortgage, and might have come, at any time, to redeem. *Milne*, the Purchaser, when he entered, stood in the situation of the Husbands, and was bound to do the same; consequently, the right to redeem was kept open down to the death of *Samuel Ashton*. The very point was decided in *Corbett v. Barker*.

As to there having been Adverse Possession from 1796; how can the Statute of Limitations run, where an undivided Share is conveyed? The rule of Law is that the right of one Co-Heir, will save the right of the other Co-Heir. There can be no Disseisin of one undivided Fourth part, whilst the right to the other undivided Fourth, exists. How can it be said, with reference to the Term, that *Samuel Ashton* was entitled to redeem; but that, as to *James Ashton*, the right was gone? The right cannot be lost as to one, whilst it remains as to the other.

We have made out a Title to redeem as to a Moiety of the Estate, or, at all events, as to a Fourth part of it. The Rule is that a Stranger and another Party or Parties, who have conflicting claims, cannot be joined as Co-Plaintiffs (*h*). This Case does not fall within that Rule,

(*h*) See *Cholmondeley v. Clinton*, *ubi supra*; *The King of Spain v. Machado*, 4 Russ. 225; and *Delondre v. Shaw*, *antè*, Vol. II. p. 237.

even if one only of the Co-Plaintiffs shall be held entitled to redeem. *Price v. Copner* (i).

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The VICE-CHANCELLOR :

In this Case *James Ashton* and his Wife were seised in Fee, in her right, of an undivided Moiety of a certain Estate, and *Samuel Ashton* and his Wife, in her right, were seised of another undivided Fourth part; and *James Eyre* was the owner of the other Moiety; and the Entirety was subject to a Mortgage Term of 1,000 years. 3d December.

By Indentures of Lease and Release of 1784, all these Parties professed to convey the Estate to *John Milne*, for Valuable Consideration. It appears that they were imperfectly skilled in Conveyancing; for a Bond was taken to indemnify the Purchaser against the Dower and other rights of the Married Woman. The Term of 1,000 years also was assigned to a Trustee to attend the Inheritance: but this is not material to the question now before me. The Title is deduced from *John Milne* to the Defendants; but nothing turns on the mode in which that has been done. *James Ashton* died in the month of September 1796; his Wife survived him, and married again. She survived her second Husband and died in 1825, and *James Ashton*, one of the Plaintiffs, is her Son. *Frances*, the Wife of *Samuel Ashton*, died in 1818, and her Husband died in 1826. *Samuel Ashton*, the other Plaintiff, is her Son. The Plaintiffs found their right to the relief sought by the Bill, on the alleged novel accruer of their Title: but they are not entitled to any relief, unless they are entitled to redeem the Mortgage

(i) 1 Sim. & Stu. 347.

1833.

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Term: and, the question is whether, because their Title has accrued within 20 years, they have a right to that relief against the Defendants, whose Title is founded on undisturbed possession since 1784.

It is a settled Rule that a Court of Equity regards more the antiquity of possession by the Defendant, than the novel accruer of Title to the Plaintiff; and that it will not interfere against a person who, claiming by a Mortgage Title, has been in possession more than 20 years without having recognized the right to redeem. This Rule is, in a great degree, established by *Cholmondeley v. Clinton* and the Cases which are reported, by Mr. *Bligh*, to have been cited on the Appeal to The House of Lords.

The Case of *Price v. Copner* has been cited as infringing the rule. But that Case seems to me to afford the strongest evidence of the Rule: for, by the Decree on the hearing, it was referred to the *Master* to inquire whether the *Defendants* or those under whom they claimed, had, in any way, treated their Title as a Mortgage Title, at any time within 20 years before the filing of the Bill (*k*). It is clear that the reference could only have been made in order to ascertain whether the Defendants had placed themselves without the benefits of the Rule. That Case, therefore, is a confirmation of the Rule. What afterwards occurred on the Exceptions is immaterial.

The same Volume which contains the Report of *Price v. Copner*, contains also a Report of *Harrison v. Hollins* (*l*). It appears, by my note of that Case, which is

(*k*) 1 Sim. & Stu. 347.

(*l*) Ibid. 471.

referred to in the Report of *Price v. Copner*, that Sir *Wm. Grant*, in his Judgment, cited a Case of *Dallas v. Floyd*, which was heard in 1739. There a Tenant for Life of an Equity of Redemption, permitted the Mortgagee to enter into possession. The Tenant for Life died in 1721, and, in 1737, which was more than 20 years after the Mortgagee's entry into possession, the Remainder Man filed his Bill to redeem; and it was dismissed with Costs. Therefore this Rule has prevailed, uniformly, except in the Case of *Corbett v. Barker*.

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MILNE.

In that Case there was a Decision by *Eyre*, Chief Baron, and a renewal of that Decision by *Macdonald*, Chief Baron. There is great force in the Argument of Sir *Samuel Romilly*; and I cannot but think that the better decision was reversed. I am not, however, left to choose between the conflicting Decisions of those Learned Judges, because I take the Rule to be established: and I am of opinion that this Bill must be dismissed with Costs.

GOODALL v. PICKFORD.

1833:
11th Dec.

MR. STINTON moved to open the Biddings for eleven Lots, purchased by different Purchasers, on an advance of a certain Sum for each Lot. He cited *Watts v. Martin (a)*. Mr. *Wakefield*, Mr. *Jacob*, Mr. *Kindersley*, Mr. *Girdlestone*, jun. and Mr. *Gordon* opposed the Motion, on the ground that a separate Motion ought to have been made as to each Lot.

Practice.
Opening
Biddings.

A Motion to open Biddings for several Lots purchased by different Purchasers, on an advance of a certain Sum for each Lot, is irregular.

(a) 4 Bro. C. C. 113.

1833.

GOODALL

v.

PICKFORD.

The *Vice-Chancellor* expressed his disapprobation of the Case cited, and held the objection valid.

Motion refused with Costs.

1834:
3d May.

Practice.
Opening
Biddings.

BATES v. BONNOR*.

THIS was a Creditor's Suit.

Under the Decree, the Debtor's Estates were put up to Auction in four Lots; and, by the Conditions of Sale, the Timber on each Lot was to be paid for, by the Purchasers, according to a Valuation previously made.

An Estate was put up to sale in four Lots, and the Timber on each Lot was to be paid for by the Purchaser, according to a Valuation which had been made.

A. purchased Lot 1; the other Lots were not sold. *B.* opened the Biddings, and, on the re-sale, purchased Lots 1 and 2, for 2,140 *l.*, and Lot 3, at 380 *l.* The Court refused

None of the Lots was sold, except the first, which was purchased by *Bates* for 1,500 *l.* The Biddings were afterwards opened by *Bonnor*; and the Estates were again put up to Auction. *Bonnor* purchased Lots 1 and 2 at Sums amounting to 2,140 *l.*, and Lot 3, at 380 *l.* The valuation of the Timber on the two first Lots, was 1,193 *l.*

Bates now moved to open the Biddings for those two Lots, on an advance of 210 *l.*, being nearly 10 per cent. on the price of the Lots without the Timber.

* *Ex relatione.*

to open the Biddings for Lots 1 and 2, on the application of *A.*, unless he would advance 10 per cent. on the price of the Timber as well as the Land, and would take Lot 3 (in case *B.* should retire from it), at the price it had been sold for, in case it should not fetch the same price at the re-sale.

Mr. *Knight* and Mr. *Walcott*, in support of the Motion.

1834.

BATES
v.
BONNOR.

Sir *E. Sugden*, for *Bonnor*, said that the Biddings ought not to be opened except upon an advance of 10 per cent. at the least, upon the aggregate Sum for which the Lots and the Timber thereon had been sold: that, as *Bonnor* stated, in his Affidavit, that he bid for Lot 3 because he had purchased the other two Lots, he would be entitled to be discharged as to that Lot, in case the Biddings should be opened as to the others: *Price v. Price (a)*: and, consequently, that *Bates* ought to provide against any Loss that might arise on the re-sale of Lot 3.

Mr. *Knight*, in reply, said that the Land being the sole object of competition at the Sale, the advance ought to be calculated only on the Sum for which it was sold: that, in *Price v. Price* and *Fielder v. Fielder (b)*, the Order went no further than to discharge the Purchaser as to the subsequent Lots.

The VICE-CHANCELLOR:

I think that the advance should be on the Price of the Timber as well as the Land; and, in order to protect the Estate from the possibility of Loss if Mr. *Bonnor* should retire from Lot 3, as he is at liberty to do, Mr. *Bates* ought to take it at 380*l.*, the Sum at which it is now sold, in case that Sum should not be offered for it at the re-sale. If he will agree to this, and will increase his offer to 333*l.*, that is, 10 per cent. on the aggregate Sum for which the Land and Timber com-

(a) 1 Sim. & Stu. 386.

(b) Ibid.

1834.

BATES

v.

BONNOR.

prised in Lots 1 and 2, are now sold, I think that the Biddings ought to be opened on his paying Mr. *Bonnor* all Costs incurred by him in consequence of his having purchased the Three Lots, and opened the Biddings as to Lot 1.

Bonnor having consented to offer the Sum required, the following Order was drawn up: "Whereupon, &c. the Plaintiff, *T. Bates*, by his Counsel offering to advance the Sum of 333*l.* on the Biddings for those parts of the Estates in question in this Cause which are comprised in Lots 1 and 2, and of which the Defendant *J. Bonnor* has been reported the best Purchaser, and upon the said Plaintiff *T. Bates* paying to the said Defendant *John Bonnor* the Costs, Charges and Expenses he hath paid and been put to by reason of his Bidding for and being reported the Purchaser of the Premises comprised in the said Lots Nos. 1, 2 and 3, including therein the Costs, Charges and Expenses paid and incurred by him upon his opening the Biddings for Lot 1, to be taxed &c.: this Court doth order that it be referred back to the said *Master* to allow of a better Purchaser of the said Estate and Premises comprised in the said Lots Nos. 1 and 2: and it is ordered that the Person or Persons who shall be allowed the best Bidder or Bidders, other than the said Plaintiff *T. Bates*, do, within 10 days, make a deposit, after the rate of 10*l.* per cent., on their respective Biddings, the Sum to be ascertained by the said *Master*, and pay the same into the Bank, &c.; and, in default of making such deposit or deposits by the time aforesaid, it is ordered that the said respective Biddings be considered as void, and that the said *Master*, without further Motion, re-sell the said Estates: And it is ordered that the Defendant, *J. Bonnor*, do relinquish

and give up the Estates and Premises comprised in Lot No. 3, of which the said Defendant *John Bonnor* has been reported the best Purchaser: And it is ordered that it be referred to the said *Master* to allow of a better Purchaser of the said Estates and Premises comprised in the said Lot No. 3: And it is ordered that the Person or Persons who shall be allowed the best Bidder or Bidders for the said Lot No. 3, other than the said Plaintiff *T. Bates*, if he should become the Purchaser thereof as hereinafter mentioned, do within 10 days, make a deposit, &c. and pay the same into the Bank, &c.: and, in default of making such deposit by the time aforesaid, it is ordered that the said Biddings be considered as void, and that the said *Master* do, without further Motion, re-sell the said Estate and Premises comprised in the said Lot No. 3: And in case, at such resale of the said Estate and Premises comprised in the said Lot No. 3, the Biddings for the same shall not exceed the Sum of 380*l.* and the Sum of 60*l.* 14*s.* 8*d.* for the Timber thereon, being the Price at which the said Defendant *John Bonnor* stands reported the Purchaser, it is ordered that the said Plaintiff *T. Bates* be considered as the Purchaser of the Estates and Premises comprised in the said Lot No. 3, at the said Sum of 380*l.* and the Sum of 60*l.* 14*s.* 8*d.* for the Timber thereon: And it is ordered that the Sum of 200*l.* paid into the Bank to the credit of this Cause, by the said Defendant *John Bonnor*, upon his opening the Biddings for Lot 1 in pursuance of the Order made in this Cause on the 25th day of November last, and now remaining on the credit of this Cause, be repaid to the said Defendant *J. Bonnor*; and, for the purposes aforesaid, the said Accountant-general is to draw on the Bank, &c.

1834.

BATES
v.
BONNOR.

1833 :
16th Dec.

Practice.
Defendant.

An Attachment issued against a Defendant before the making of a Motion by him, but after service of the Notice of Motion, will not prevent the Motion being made.

JEYES v. FOREMAN.

SIR E. SUGDEN and Mr. Girdlestone, jun., for the Defendant, Mrs. Lloyd, moved to discharge an Injunction, for irregularity.

Mr. Knight and Mr. Bethell, for the Plaintiff, said that Mrs. Lloyd was in Contempt, and, therefore, was not entitled to move, except for the purpose of discharging the Process of Contempt.

Sir E. Sugden, in reply, said that the Attachment was issued after the Notice of Motion was served, and, therefore, the Motion ought to proceed.

And The Vice-Chancellor so ruled.

1833 :
10th Dec.

Purchaser.

A Purchaser from a Devisee, subject to Debts and Legacies, is bound to see his Money applied in payment of the Legacies, if the circumstances of the

Transaction afford Evidence that the Debts have been paid, and that the Devisee is dealing with the Estate as Owner.

JOHNSON v. KENNETT.

WILLIAM KENNETT, by his Will dated in 1808, gave to his Wife an Annuity of 50*l.*, for her Life, and a Legacy of 1,000*l.* to each of his three Daughters, to be paid to them at 21 or Marriage, with Interest in the meantime for their Maintenance and Education; and, subject thereto, and to the Payment of his Debts, Funeral and Testamentary Expenses, he gave all his Real and Personal Estate to his Son, *Thomas Kennett*, his

Trusts v. Baines, 12 Sim. 328. Thoroughgood v. Ansdley 1 Jeff. Macn. 440. 648.

Heirs, Executors, Administrators and Assigns, and appointed him his Executor.

1833.

JOHNSON

v.

KENNETT.

The Testator died in May 1809, leaving *Thomas Kennett*, his only Son and Heir, and his Widow and three Daughters him surviving. *Thomas Kennett* proved the Will, possessed himself of the Personal Estate, and entered into the possession of the Real Estate.

By Lease and Release, dated the 14th and 15th of January 1810, and by Fine, he and his Wife conveyed the Estates to uses to bar Dower, and, in the course of the same and the two following years, he sold, appointed and conveyed the Estates, in Lots, to different Purchasers, but did not pay or make any provision for the Annuity or Legacies. Some of the Purchase Deeds recited the Will (omitting the charge of Debts), the conveyance to uses to bar Dower, and that *Kennett* had agreed to give Bonds, to the Purchasers, to indemnify them against the Legacies. To some of these Deeds the Widow was a Party, and released her Annuity as to the Hereditaments therein comprised. The rest of the Purchase Deeds merely recited the Will and the conveyance to uses to bar Dower. *Kennett* gave Bonds to all the Purchasers, The Bonds that accompanied the First Class of Deeds, contained the same recitals as those Deeds, and were conditioned for indemnifying the Obligees against the Legacies. The other Bonds did not notice the Will, and were conditioned, merely, for quiet enjoyment, free from all Incumbrances, except the Rents and Services due to the Lord of the Fee.

In 1823 *Thomas Kennett* conveyed and assigned all his Real and Personal Estate, to a Trustee for his Creditors.

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v.

KENNETT.

The Bill was filed by the Testator's Daughters, two of whom were still Infants, against *Thomas Kennett*, the Trustee, for the Creditors, the Purchasers of the Estates, and the Widow, stating that *Thomas Kennett* had proved the Will and possessed the Personal Estate, and, thereout, paid the Funeral and Testamentary Expenses and Debts, and applied the Residue to his own use ; that the Purchasers completed their Purchases without inquiring whether the Annuity and Legacies had been properly secured, or in anywise requiring that the same should be so secured : that they had notice that the Annuity and Legacies were well charged on the Real Estates, and that the same had not been secured to be paid by *Thomas Kennett*, so as to exonerate the Real Estates from the payment thereof ; and that they took Indemnities, from *Thomas Kennett*, against the Annuity and Legacies. The Bill prayed that the Will might be established, that the Annuity and the Legacies might be declared to be well charged upon the Real Estates, and that the Purchasers might be decreed to contribute, in proportion to the amount of their respective Purchases, towards the payment of the Legacies and the providing of a Fund for payment of the Annuity ; or that the Real Estates might be sold for those purposes.

The Purchasers, in their Answer, said they could not set forth whether *Thomas Kennett* had or had not paid the Testator's Debts and Funeral and Testamentary Expenses out of the Personal Estate and applied the Residue to his own use ; they admitted that they never inquired whether the Annuity and Legacies had been properly secured, or required, before they completed their Purchases, that the same should be so secured : and they submitted that they were not bound to see to the appli-

cation, nor were answerable or accountable for the misapplication or non-application of their respective Purchase Monies : and they admitted that, at the time of their respective purchases, they had, by the Will, but not otherwise, notice, and they believed that the Annuity and Legacies were well charged on the Real Estates, and that the same had not been, in any way, secured to be paid by *Thomas Kennett*.

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JOHNSON
v.
KENNETT.

Sir *E. Sugden* and Mr. *R. Roupell*, for the Plaintiffs :

First: With respect to the Purchasers who took the Special Bonds. A Devisee of an Estate subject to Legacies, is, in fact, a Trustee ; and, whenever the Court sees Parties dealing with the Devisee, not in his character of Trustee, but as owner of the Estate, it will follow the Land. *Watkins v. Cheek* (a). *T. Kennett*, by conveying the Estates to uses to bar Dower, assumed the character of owner. No Fine was necessary if he sold under the Will ; for there could have been no claim of Dower if he sold as Trustee. The Purchasers took Bonds of Indemnity against the Legacies ; and, in their Answer, they state their belief that the Legacies had not been secured to be paid by *T. Kennett*.

Mr. *Pepys* and Mr. *Wray*, for the Purchasers :

The Purchasers are protected by the charge of Debts. *T. Kennett* was the owner of the Estate, subject to the charges. He had a right to deal with it ; and he has dealt with it so as to make a different mode of Conveyance necessary. How does that circumstance show that he did not intend to sell for payment of the Debts ?

(a) 2 Sim. & Stu. 199.

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JOHNSON

v.

KENNETT.

The Purchasers state, in their Answer, that they cannot set forth whether or not the Debts have been paid.

[The VICE-CHANCELLOR:—There is an admission that they knew the Legacies were unpaid, but there is no statement that they knew the Debts were paid.]

There is an absence of all proof as to the Debts. Is the circumstance of the Devisee having changed the nature of his Estate, to deprive the Purchasers of the protection of the charge of Debts? Whatever a Devisee may do with his Estate, his duty to Parties who have a prior claim, cannot be altered. *Watkins v. Cheek* decides, merely, that, where a Party lends himself to a Breach of Trust for his own benefit, he shall be liable. Here the Purchasers had no knowledge of any Breach of Trust, or of any intention to commit a Breach of Trust. The Bonds assume that the Party who received the Money, was to pay the Legacies: they were taken by the Purchasers *ex abundanti cautela*.

The VICE-CHANCELLOR:

I do not understand that the Record is so framed as to raise the issue whether the Debts were paid at the time when the Estates were conveyed to the Purchasers (b). But, if the issue had been raised, I am of opinion that the form of the Conveyances and the Bonds, would be receivable, as between the Purchasers and the Plaintiffs, to show that, at the time of the Conveyances, the Debts were paid. If the Debts were not paid, it was unnecessary for the Purchasers to resort to the

(b) The Bill alleged that *T. Kennett* paid the Debts out of the Personal Estate.

machinery which they have adopted. The form of the Bonds of Indemnity shows that the Parties did not think it necessary to advert to the Debts at all. Those Bonds do not notice the charge of Debts, but they recite the Will as if there was no charge of Debts in it. Therefore, they afford evidence that the Debts were paid: and, as between the Purchasers and *Kennett*, I must take it as a transaction in which the Purchasers were advised to take the Bonds as an additional security.

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KENNETT.

Independently of that, it appears, on the face of the transaction, that the Purchasers were dealing with *Kennett* as owner of the Estate subject to the Legacies, and not as a Person to whom the Estates had been devised subject to the general charge for Payment of Debts and Legacies.

From the form of the Conveyances and of the Bonds of Indemnity, I am of opinion that the Estates of the Purchasers must be taken as subject to the Legacies.

Sir *E. Sugden* and Mr. *R. Roupell*, with respect to the Purchasers who took the General Bonds, contended that the same principle applied to them, as to the other Purchasers.

Mr. *Pepys* and Mr. *Wray* said that the Bonds for quiet enjoyment free from all Incumbrances, were taken merely as an additional security to the Covenants for the same purpose, and that, as the taking of the Covenants afforded no evidence of an intention to commit a Fraud

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v.

KENNETT.

or a Breach of Trust, so neither did the taking of the Bonds.

The VICE-CHANCELLOR :

The question is, in what character the Vendor was placed.

All the Deeds recite the Will, and also take notice of the Conveyance and Fine of January 1810 : that circumstance shows that *Kennett* was dealing, not as Devisee subject to the general charge of Debts and Legacies, but as Owner of the Property.

The Will, as recited in the Conveyances, notices the charge of Legacies ; and those Conveyances were accompanied by General Bonds. The Bonds could have been given for no other purpose than to protect the Purchasers from the Legacies.

The Decree, as drawn up, referred it to the *Master* to take an account of the Testator's Personal Estate, not specifically bequeathed, come to the hands of *Thomas Kennett*, and also of the *Debts*, Funeral Expenses and Legacies and Annuities of the Testator, and directed that the Personal Estate should be applied in payment of the *Debts* and Funeral Expenses, in a course of administration, and then in payment of what remained due on account of the Legacies and Annuities, and, in case the Personal Estate should not be sufficient for payment of what was due for such Debts, Funeral Expenses and Legacies and Annuities, it was declared that the Real Estates comprised in the Will were well charged with the Debts, and with the Legacies and Annuity given thereby, and that the same, in the hands of the Defendants claiming as

Purchasers from *Thomas Kennett*, were then liable to raise and pay what remained due in respect thereof, or so much as the Personal Estate should be insufficient to pay.

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3 A x K. 624

* This Decree was reversed by Lord *Lyndhurst*, C.; but, as The *Vice-Chancellor's* decision is stated as an authority, in Sir *E. Sugden's* Treat. on Vendors, Vol. II. p. 39, it was deemed advisable to report the Case. See 4 B x C. 427

GRAVES v. HICKS.

JOHN HICKS, by his Will dated the 4th of May 1821, gave his Copyhold Messuage, &c., called *Plomer Hill House*, in the County of *Bucks*, unto and to the use of Trustees and their Heirs, in Trust for his Wife, for her Life or Widowhood, or until she should cease to

1833:
9th December.
Will.
Construction.
Tenant for Life.
Priority.
Cumulative
Legacies.

Testator, by his Will, gave an Annuity, to his Daughter, out of certain Estates, for her separate use. By a Codicil, he gave her a Life Estate, for her separate use, in the same Estates. Held that the Daughter was entitled to the Life Estate only.

Testator charged his Estates with an Annuity in favour of his Wife, and, *subject thereto*, he devised the Estates in strict settlement. Afterwards, by his Will and Codicils, he charged the Estates with several other Annuities to his Wife and other Persons. Held that the first-mentioned Annuity was the primary Charge on the Estates.

Testator devised an Estate to his Daughter for Life, with Remainder to her Husband for Life, and charged other Estates with the payment of an Annuity to his Daughter, and, after her death, with the payment of an Annuity to her Husband. He then made a Codicil which, in effect, revoked the Husband's Life Estate in Remainder. By a subsequent Codicil, he gave, to the Husband, a Life Estate in possession in the first Estate, and also an Annuity in possession, to the same Amount and charged upon the same Estates as the former Annuity. Held that the second Annuity was substituted for the first.

See Robinson v. Harcourt DD 3
1 Kay 696
Framan v. Ellis
1 N. V. M. 757.

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reside therein, and, on her Death, second Marriage, or ceasing to reside on the Premises, the Testator directed his Trustees to stand seised thereof upon the Trusts after declared of the Residue of his Real Estates: and he gave to the same Trustees and their Heirs, during the Lives of his Niece *Frances Mountstevens* and his Daughter *Anna Maria Hearle*, and the Life of the Survivor of them, his Freehold Estate called *Treravel* in *Cornwall*, in Trust to pay an Annuity of 20*l.* for the separate use of his Niece, for her Life, and to dispose of the Residue of the Rents for the separate use of his Daughter, and, after the Death of his Daughter, but subject to the Annuity of 20*l.*, he gave the Estate to her Children, as Tenants in Common in Tail, with Cross Remainders amongst them in Tail, with Remainder to the Uses after declared of the Residue of his Real Estates: and he gave his Manor of *Bradenham* in the County of *Bucks*, and all the Residue of his Real Estates, subject nevertheless to such Charges and Incumbrances as should, at the time of his Decease, be existing and charged thereon or any part thereof, under or by virtue of any Marriage Settlement or otherwise, to the same Trustees and their Heirs, to the use that his Wife might, during her Widowhood, receive thereout an Annuity of 300 *l.* a year, and, *subject thereto*, to the use of his Son for Life, with Remainders to his first and other Sons, successively, in Tail Male, with Remainder to the intent that the Testator's Wife might receive, during her Life or Widowhood, a further Annuity of 100 *l.*, and that the Trustees might, during the term of 99 years, if his Daughter should so long live, *take a like Annuity of 100 l. in Trust for the separate use of his Daughter*, with Remainder to his Grandson, *John Graves*, for his Life, with Remainders to the first and other Sons of *John*

Graves, successively, in Tail Male, with several Remainders over.

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The Testator, by his first Codicil, after reciting that his Son had died unmarried and without Issue, since the execution of his Will, gave his *Treravel* Estate, after the Death of his Daughter, to her Husband, *Francis Hearle*, for his Life, and, after his Death, to the Uses to which the same stood limited, by his Will, after the Death of his Daughter. And he charged his Manor of *Bradenham* and all his other Residuary Real Estates with the payment of a further Annuity of 100*l.* to his Wife, for her Life or Widowhood, in addition to the Annuities charged thereon, in her favour, by his Will, and which, as well as all the other provisions for her, he thereby ratified and confirmed: and he charged the same Estates with the payment to his Trustees, during the term of 99 years, if his Daughter and her Husband or either of them should so long live(a), of a further Annuity of 200*l.*, upon Trust, during his Daughter's Life, to apply the same for her separate use, in addition to the Annuity of 100*l.* provided for her, by his Will, out of the same Estates, and which he thereby ratified and confirmed: and he charged the same Estates with the payment, after his Daughter's Death, of an Annuity of 100*l.* to her Husband, *Francis Hearle*, for his Life, in addition to the benefits thereby given to him.

The second and third Codicils did not affect the Real Estates.

(a) It was contended (but unsuccessfully) that, under the above Clause, Mr. *Hearle* was entitled to an Annuity of 200*l.* after his Wife's death.

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The Fourth Codicil was as follows:—"And I do make and add this further Codicil to my Will, hereby revoking and making null and void *several* of the dispositions heretofore made by me, in my said Will and Codicils, of all my Freehold, Copyhold and Personal Estate and Effects of all and every kind and description; and, instead and in the place of such Devise, Disposition and Bequests thereof, I do give and bequeath all and every my Freehold, Copyhold and Personal Estate and Effects, of every kind and description whatsoever and where-soever situated, unto my Daughter, *Anna Maria Hearle*, for her Life, and, from and after the determination of that Estate, I give, devise and bequeath the same unto my Grandson, *John Graves*, and his Heirs, in strict Entail, as in my said Will directed." (The Testator then directed that his Grandson should not be put in possession of his Estates until he should attain the age of 31 Years, and that, in the meantime, the Rents should be accumulated for his benefit.) "And, in failure of Issue of the said *John Graves*, I order that my said Estates and Effects shall go and descend as is by my said Will directed. And I do *ratify and confirm the several Annuities and Donations by me, in my said Will and former Codicils, given and bequeathed*. And I do further give and bequeath, unto my dear Wife, one other Annuity of 100*l.*, to be paid her in like manner and with the like restrictions as the former ones given her by my said Will and Codicils, hereby, in all other respects but what is above mentioned, confirming my said Will and Codicils."

By the Fifth Codicil, the Testator expressed his will and meaning to be that what he had left his Daughter, should be at her own disposal, and independent of her

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Husband, and not subject to his Control, Debts or Creditors, and that any Lease or Appointment which she might make of his Estates, should be valid, and that her Receipt should be a discharge for any Rents or Money paid to her, notwithstanding her coverture. But, to show his regard for her Husband, the Testator left him the Rents and Profits of his Estate of *Treravel* during his Life, (subject, however, to an Annuity of 20 *l.* to his Niece, Mrs. *Mountstevens*, for her Life,) and also an Annuity of 100 *l.* further, during his Life, out of the *Bradenham* Estates. And he gave and confirmed, to his Wife, all Sums of Money which she or he might be entitled unto out of the Effects of her late Father, or that any other Friend might leave her; and he ordered his Executors, in case she died before him, to fulfil her will and disposal thereof (*b*).

On the hearing of Exceptions taken by the Plaintiff, *John Graves*, and also by the Defendant, Mrs. *Hicks*, to the Master's Report of the 21st of June 1833, and on the Cause coming on for further Directions, the following Questions were raised:

First, Whether Mrs. *Hearle* was entitled to the Annuities of 100 *l.* and 200 *l.* provided for her by the Will and first Codicil, and also to the Life Estate given to her by the Fourth Codicil:

(*b*) See *Doe v. Hicks*, 8 Bing. 475, where the Will and Codicils are more fully stated. The Vice-Chancellor considered that the spirit of the Decision in the House of Lords bound any other Court that had to decide upon any portion of the Testator's Property that was similarly circumstanced to the *Plomer Hill* Estate; and, therefore, His Honor held that the specific Bequests to Mrs. *Hicks*, in the Will and First and Third Codicils, were not revoked by the Fourth Codicil.

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Secondly, Whether the Annuity of 300 *l.* given to Mrs. *Hicks* by the Will, was a prior Charge to the several other Annuities given by the Will and Codicils (c):

And thirdly, Whether the Annuity of 100 *l.* given to Mr. *Hearle* by the Fifth Codicil, was in addition to, or in substitution for the Annuity of 100 *l.* given to him by the First Codicil.

Sir *E. Sugden* and Mr. *Koe*, for the Plaintiff.

Mr. *Pepys*, Mr. *Beames* and Mr. *Patch*, for the Defendant, Mrs. *Hicks*.

Mr. *Knight* and Mr. *Wigram*, for the Defendants, Mr. and Mrs. *Hearle*.

Mr. *Barber* and Mr. *Wright*, for the Trustees.

The VICE-CHANCELLOR :

First: notwithstanding the Testator does, in his Fourth Codicil, ratify and confirm the several Annuities and Donations by him given and bequeathed in his Will and former Codicils, I cannot think that he intended that Mrs. *Hearle* should have the two Annuities which, by the Will and First Codicil, are charged in her favour on the *Bradenham* Estates, and that she should take a Life Interest also in the same Estates. For though I admit, according to the Case that has been cited (d), that a

(c) It was alleged that the Rents of the Estates were insufficient to pay the Annuities in full.

(d) *Forbes v. Moffatt*, 18 Ves. 384

Person may have a Life Interest and also a Charge on the same Lands, there would be a palpable inconsistency, in substance, (though not in the technical Language used by the Testator,) in giving, to Mrs. *Hearle*, a Life Interest and also an Annuity for her separate use out of the same Estates.

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Secondly: The Testator first gives the Annuity of 300*l.* to his Wife, and "subject thereto," he devises the Estates on which it is charged, to his Son in strict Settlement, and then he gives other Annuities out of the same Estates: I am, therefore, of opinion, that the Wife's Annuity is a primary charge to all the other Annuities given by the Will and Codicils; but there is no priority between the other Annuities, and they must all be paid *pari passu*.

Thirdly: According to the Decision in the House of Lords, the effect of the Fourth Codicil was to revoke the Life Estate in Remainder which, by the First Codicil, had been given, to Mr. *Hearle*, in the *Treravel* Estate (*e*). Supposing then that the Testator was aware that, by the Fourth Codicil, he had, of necessity, revoked the Estate for Life in Remainder in the *Treravel* Estate (about which, after what has taken place in the House of Lords, I am not at liberty to say there is any doubt), he may also have supposed that the effect of the Fourth Codicil might be to destroy the Annuity which, by the First Codicil, he had given, to Mr. *Hearle*, in Remainder after the death of his Wife (*f*): and it appears to me

(*e*) See 8 Bing. 489.

(*f*) The Fourth Codicil *ratified and confirmed* the Annuities given by the Will and former Codicils.

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that the mode in which he revived the Estate for Life in the *Treravel* Estate and accelerated it, is only to be attributed to the fact that he intended to undo what he had done by the Fourth Codicil: and the same intention must be taken to have been in his mind when, by the Fifth Codicil, he gives, to Mr. *Hearle*, an Annuity in possession out of the *Bradenham* Estates, he having, by the First Codicil, given Mr. *Hearle*, out of the same Estates, only an Annuity in Remainder after the death of his Wife. Therefore, I am of opinion that the Life Estate in possession in the *Treravel* Estate, and the Annuity in possession out of the *Bradenham* Estates, were given, to Mr. *Hearle*, in lieu of the Life Estate and Annuity in Remainder which were given to him by the First Codicil.

1835:
14th July.*Mortgage.*
Exoneration.

A Father having agreed to secure a Marriage Portion for his Daughter, mortgaged Part of his Estates for that purpose, and covenanted to pay the Money. By his Will, he directed his Debts to be paid first out of the Residue of his Personal Estate, then, out of his Money in the Funds, and, lastly, out of his residuary Real Estates. Held that the mortgaged Estate was not to be exonerated, from the Portion, out of the Personal Estate.

THE Testator, after disposing of his *Bradenham* and other residuary Estates in the manner stated *antè*, page 392, gave, all his Money in the Parliamentary Stocks or Funds of Great Britain, to the Trustees, in Trust for his Wife, during her life or widowhood, and, after her death or second Marriage, in Trust, absolutely, for the Person who, under his Will, should then, either as Tenant for Life or in Tail Male, be in the actual possession of his residuary Real Estates thereinbefore devised, or entitled to the Rents and Profits thereof: and he disposed, in like manner, of the Household Goods, Furniture, Books, Prints, Pictures, China, Glass and Plate, which should belong to him at the

Loosemore v Chapman / Kay 130.132.

time of his decease: and he gave all the Ready Money, Wines, Provisions, Provender, Live and Dead Stock, which should be in or about his Mansion called *Plomer Hill House* at his decease, and also all the Articles of Plate brought by his Wife on her Marriage, and his Family Carriage, to his Wife, for her own absolute use and benefit: And, as to all the rest and residue of his Personal Estate and Effects not thereinbefore specifically bequeathed, he gave the same, subject and charged with the Payment of all his just Debts, Funeral and Testamentary Expenses and the pecuniary Legacies given by his Will, or which he should give by any Codicil thereto, to his Son for his own absolute use and benefit: Provided that, if the residue of his Personal Estate should be insufficient to answer all his said Debts, Funeral and Testamentary Expenses and Legacies, then he charged his Funded Property thereinbefore bequeathed, and, if that should be insufficient, then the residue of his Real Estates thereinbefore devised, with the Deficiency.

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By the Order on further Directions of the 9th of December 1833, it was, amongst other things, referred to the *Master* to inquire whether any and which of the Mortgage Debts or other Incumbrances affecting the Testator's Real Estates, constituted a Debt or Debts which, in the first instance, ought to be paid out of the residue of the Testator's Personal Estate, and, if that Fund should be insufficient, then out of his Parliamentary Stocks and Funds: and it was declared that the residue of the Testator's Personal Estate was the primary Fund for the payment of his Debts, Funeral and Testamentary Expenses and Legacies, and that his Parliamentary Stocks and Funds were the second Fund for

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the payment thereof, and that the residue thereof, if any, was a charge upon his residuary Real Estates.

On the 6th of March 1835, the *Master* reported that, by an Indenture dated the 31st of January 1807, and made between the Testator of the one part and certain Trustees of the other part, after reciting an intended Marriage between the Testator's eldest Daughter and *Charles Gray Graves*, and that, on the Treaty for the Marriage, the Testator had proposed and agreed to *secure*, to the Trustees, 6,000*l.*, as and for the Marriage Portion of his Daughter, by a Mortgage of the Hereditaments thereafter demised, of which the Testator was seised in Fee-simple in possession free from Incumbrances, to be paid, at the end of 12 Calendar Months next after his death, upon the Trusts of an Indenture of Settlement of even date: It was witnessed that, in pursuance of the said Proposal and Agreement of the Testator, and in consideration of the intended Marriage, and for *securing*, to the Trustees, the sum of 6,000*l.* with Interest as after mentioned, upon the Trusts of the Settlement, the Testator demised, to the Trustees, the Hereditaments therein described (being part of his residuary Real Estates) for 1,000 years, subject to a Proviso for the Cesser of the term, if the Heirs, Executors or Administrators of the Testator should, within 12 Calendar Months after his death, pay to the Trustees 6,000*l.* with Interest at 5*l.* per Cent. from his Death until payment thereof; and also if the Testator should pay, to the Trustees, Interest, after the like rate, on 4,000*l.*, part of the 6,000*l.*, from the solemnization of the Marriage up to the Day of his Death, upon the Trusts of the Settlement. And the Testator, for himself his Heirs, Executors and Administrators cove-

nanted with the Trustees for payment of the Principal and Interest pursuant to the Proviso, and entered into the other Covenants which are usual in Mortgages of the like nature.

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The Recitals in the Settlement were to the same effect as those in the Mortgage Deed, and thereby Trusts were declared, of the Principal and Interest secured by that Deed, for the benefit of the Testator's Daughter and her intended Husband, and the Children of the Marriage.

The Marriage was solemnized on the 31st of January 1807. The Plaintiff was the only Issue of the Marriage.

The *Master* found that the Mortgage Debts created by the Indenture of the 31st of January 1807, ought not, in the first instance, to be paid out of the residue of the Testator's Personal Estate, or, if that Fund should be insufficient, then out of the Testator's Parliamentary Stocks and Funds; but that the *Mortgaged Premises were charged with and subject and liable, in the first instance, to the payment of the 6,000 l. and Interest.*

The Plaintiff excepted to the Report.

Mr. *Kindersley* and Mr. *Koe*, in support of the Exception :

The Testator did not create a Trust-term for raising the Portion for his Daughter, but he mortgaged his Estate to the Trustees, as a security for the Debt : they might have foreclosed the Mortgage ; but they had no

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Power, by reason of any Trust, to raise the 6,000*l.* out of the Estate. In the Cases in which the Court has said that the Real Estate shall not be exonerated, either there has been no Covenant for payment of the Money, or there has been a Trust created for raising it, or the Party has been settling the whole of his Estate on his Marriage. *Lady Coventry v. Lord Coventry* (a); *Edwards v. Freeman* (b); *Wilson v. Lord Darlington* (c); *Lanoy v. The Duke of Athol* (d).

In *Lechmere v. Charlton* (e), Sir *W. Grant* says: "It is difficult to conceive how a Man can make himself a Debtor (although, by the same Instrument, he charges the Real Estate) without subjecting his Personal Assets, in the first instance, to the payment of the Debt. Here the Settlor, certainly, makes himself a Debtor, by his Covenant." So that, in that Case, though there was a Trust for raising the Money and not a Mortgage, yet Sir *W. Grant* inclined to think that a Debt was created. In *Ex parte Digby* (f), (which is a Case that stands on the same footing as *Lady Coventry v. Lord Coventry*), Lord *Eldon* says: "In general, if a Tenant for Life with power of charging, makes a charge, his general Personal Estate will not be liable to exonerate the Land; and, in general, if he pays it off, he becomes an Incumbrancer on his own Estate. Thus, if there be Tenant for Life with power of charging, with Remainder to Trustees to preserve Contingent Remainders, with other Remainders over, and the Reversion to himself; if he makes a Mortgage, and afterwards pays it off, he

(a) 2 P. W. 222.

(b) 2 P. W. 435.

(c) 2 P. W. 664, note.

(d) 2 Atk. 444.

(e) 15 Ves. 193.

(f) Jac. 235.

is himself an Incumbrancer on the Estate, even without taking an Assignment." Then his Lordship says: "The 5,000*l.* was disposed of; that did not remain as her separate Estate. If it should appear that she had any other separate Estate, the question might be considered. It would depend upon whether the Personal Security was meant to be the primary Security, or only collateral." Therefore his Lordship did not decide between the Duchess's Real Estate and her separate Personal Estate.

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In every Case, where there has been a Mortgage redeemable by the Mortgagor and a Covenant by him to pay the Money, his Personal Estate has been held liable to exonerate the Land.

Notwithstanding the Testator devised his residuary Real Estates subject, expressly, to such Charges and Incumbrances as, at the time of his Decease, should be existing and charged thereon by virtue of any Marriage Settlement or otherwise, his Personal Estate is liable to pay off the Mortgage. *Serle v. St. Eloy* (g).

[The VICE-CHANCELLOR:—At the time when the Testator executed the Mortgage Deed, was the 6,000*l.* his Debt? It appears, by the Recitals in the Settlement as well as in the Mortgage Deed, that the Agreement was to *secure*, not to *pay* the 6,000*l.*]

The Covenant created the Debt; there was no antecedent Debt. The Testator intended to settle a sum of Money and to make his Personal Estate liable

(g) 2 P. W. 385.

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to pay it. *Waring v. Ward* (h). It is not a Settlement of Land, but of Money. *Cope v. Cope* (i).

[The VICE-CHANCELLOR:—Is there any Case like the present, in which it has been decided that the Money secured shall be paid out of the Personal Estate?]

There is no case in which it has been decided either way. This Case stands on the general Rule, independent of any authority.

If there were any doubt on the general principle, the Will itself is conclusive. The Testator, after devising his residuary Real Estates, bequeaths his Money in the Parliamentary Stocks or Funds of *Great Britain*. That is a specific Bequest; and it is followed by other specific Bequests. Then the Testator bequeaths the Residue of his Personal Estate subject to the payment of all his just Debts, &c. Then follows this proviso: that, if the Residue of his Personal Estate should be insufficient to answer all his Debts, &c., then he charged his Funded Property thereinbefore bequeathed, and, if that should be insufficient, then the Residue of his Real Estates thereinbefore devised, with the deficiency: so that the residuary Real Estates are to be only the third Fund for payment of all his Debts. The 6,000*l.* was confessedly a Debt: it was created in the same way as a common Mortgage Debt. The Real Estates are to be the last Fund for payment of Debts. Can then the Court say that the general rule and the Testator's express direction, are not to prevail? *Barnewell v. Lord Cawdor* (k).

(h) 5 Ves. 670, and 7 Ves.
332.

(i) 2 Salk. 449.

(k) 3 Madd. 453.

Mr. *Beames*, Mr. *Patch* and Mr. *Wood* appeared in support of the Report.

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But The VICE-CHANCELLOR, without hearing them, said :

It is plain that the intention of the parties was that the Covenant of the Father should be auxiliary only to the charge upon his Land ; and that what he contracted to do, was to give security for the 6,000*l.* The Mortgage Deed recites that, upon the treaty for the intended Marriage, the said *John Hicks* did propose and agree to secure unto the said *Robert Brudenell, &c.*, their Executors, Administrators and Assigns, 6,000*l.* sterling, as and for the Marriage Portion of his said Daughter, by a Mortgage of the Hereditaments thereafter mentioned. Then the Deed proceeds to create the Term to secure the 6,000*l.* ; and then, as a matter of course, there is the Covenant for payment of that Sum. The recital in the Settlement tallies with the recital in the Mortgage Deed. Therefore, it is plain, on the face of the Instruments, that the intention was that the Father should give Security on his Land for the 6,000*l.* ; and the Covenant was, merely, a matter of form, and only auxiliary. I admit that this sum of 6,000*l.* was, in some sense, a Debt. But it was said that, though the Testator has devised his residuary Real Estates subject to such Charges and Incumbrances as should, at the time of his decease, be existing and charged thereon by virtue of any Marriage Settlement or otherwise, those words mean nothing, as the Devises must take the Estates subject to the Charges : but those words must mean something where the Testator had created a Charge on his Estates for securing that which was not a Debt. In *Serle v. St. Eloy*, the words " subject to the Incumbrances thereon,"

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a Charter-party, with the Commissioners of the Navy, for the conveyance of Emigrants to *Van Diemen's Land*; in a Ship belonging to *Scott* called *The Princess Royal*. The Charter-party was dated the 20th of March 1832, and was made between two of the Commissioners of the Navy, of the one part, and *Lachlan* (*on behalf of the Owners of the Ship*) of the other part, and, thereby, *Lachlan*, on behalf of the Owners, entered into certain Covenants with the Commissioners, and, in consideration of those Covenants being performed by *Lachlan* on behalf of the Owners, the Commissioners, on behalf of His Majesty, agreed to pay to *Lachlan, on behalf of the Owners*, for the Hire and Freight of the Ship, at the rate of 3*l.* 13*s.* per Register Ton, in manner following, (that is to say) one half of the Freight to be paid, by the Lords of the Treasury, on producing a certificate of the Ship having sailed on her Voyage, and the remainder also by the Lords of the Treasury, on producing certificates of the number of persons that were embarked in England, having been landed at *Hobart's Town*.

In April 1832, the Plaintiff, by *Scott's* direction, insured the Ship and Freight for 1,800*l.*, and paid the Premiums on the Policies: and he retained the Policies in his hands as a security for the amount due to him from *Scott*.

Scott, in order to secure the repayment of some part of the Advances made by the Plaintiff for his use, signed and gave, to the Plaintiff, an Order dated the 25th of April 1832, directing *Lachlan* to pay to the order of the Plaintiff, all Monies he might receive on account of the Ship, under her then Charter to the Navy Board; and the Plaintiff delivered the Order to *Lachlan*.

Upon the sailing of the Ship, 1,100*l.* became due as one Instalment of the Freight; and *Lachlan* received that sum from the Lords of the Treasury, and, with *Scott's* privity, paid it to the Plaintiff. After the sailing of the Ship, the Plaintiff continued to make Advances on *Scott's* behalf; and, in August 1832, a Balance of 800 *l.* was due, from him, to the Plaintiff. *Scott* having delayed to give to the Plaintiff a Security for his Debt, the Plaintiff followed him to *Ireland*, and sued out a Writ for the purpose of arresting him; and, ultimately, *Scott*, after considerable pressure, executed an Indenture dated the 13th of August 1832, and, thereby, after reciting that *Scott* was indebted, to the Plaintiff, in 800 *l.*, *Scott* assigned, to the Plaintiff, all the Freight and Earnings of the Ship which might become due under the Charter-party, and all Policies of Insurance then effected or thereafter to be effected, in respect thereof in Trust to retain, thereout, the 800 *l.*, with interest from the 28th of July then last. On the 27th of August 1832, the Plaintiff served *Lachlan* with a Notice of the Assignment, and desired him to hold the residue of the Freight to become due under the Charter-party, on his (the Plaintiff's) account.

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In September 1832, the Ship arrived at *Van Diemen's Land*.

On the 15th of January 1833, *Scott* became Bankrupt, and the Defendants *Burn* and others were chosen his Assignees.

The 800 *l.* still remaining due, the Bill was filed in July 1833, stating that the 800 *l.* and upwards due for Freight,

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was then payable by the Lords of the Admiralty (to whom all Contracts entered into by the Navy Board had been transferred by 2 & 3 Will. 4, c. 40) or by the Treasury upon the Certificate or by the direction of the Admiralty, to *Lachlan*, and that the Admiralty were willing to pay that Sum to *Lachlan*, or to give him the necessary Certificate for receiving the same, it being usual to pay the Freight to the Person in whose name the Charter-party is made, and to deal with such Person only: that the Plaintiff was entitled, under his Security, to receive the 800 *l.* due for Freight, but the Assignees had, lately, set up a claim thereto, and had given Notice of such Claim to the Admiralty, and required the Fund to be paid to them. The Bill prayed that the Plaintiff might be declared to be entitled, under the Assignment, to receive the Sum due for Freight, that *Lachlan* might be declared to be a Trustee thereof for the Plaintiff, and might be decreed to receive and pay the same to him, and that *Lachlan* might be restrained from paying the same to the Assignees, and that they might be restrained from receiving or demanding the same, and, if necessary, that a Receiver might be appointed thereof.

The Answer of the Assignees submitted that the unpaid Freight did not pass by the Assignment to the Plaintiff, for want of Notice to the Parties by whom the same was payable, prior to *Scott's* Bankruptcy.

The Plaintiff now moved that *Lachlan* might be at liberty to receive the Money due for Freight under the Charter-party, from the Lords of the Admiralty or the other Persons by whom the same might be payable, and might be ordered to pay it into Court, or that a

Receiver might be appointed thereof, and that the other Defendants might be restrained from receiving the same.

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Mr. *Knight* and Mr. *Jacob*, for the Plaintiff:

Lachlan was the only Person who could receive the Freight from the Commissioners, and, therefore, he was the only Person to whom the Notice ought to have been given. The Commissioners dealt with him: he was the only Person whom they knew in the transaction. *Scott's* name is not mentioned in the Charter-party. The Commissioners agree to pay the Freight to *Lachlan*, on behalf of the Owners. The 1,100*l.* which was payable under the Charter-party on the sailing of the Vessel, was paid to *Lachlan*, and he paid that Sum to the Plaintiff, under the direction of *Scott*. *Lachlan* is not made a Party to the Charter-party merely as Covenantee, but he is the Person to whom the Money is to be paid. Consequently the Notice given to him was all that was requisite to make him a Trustee for the Plaintiff, and to take the Money out of the order and disposition of the Bankrupt. *Shack v. Anthony* (a); *Lefevre v. Boyle* (b).

Mr. *G. Richards*, for the Defendant *Lachlan*.

Mr. *Pepys* and Mr. *Koe*, for the Defendants, the Assignees:

The object of the Bankrupt Laws is to prevent false Credit being gained by supposed Ownership. Persons dealing with *Scott*, would know that his Ship was let to the Government, and would make inquiries and learn

(a) 1 M. & S. 573.

(b) 3 Barn. & Adol. 877.

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whether any Money was due from them to *Scott*, had answered that it was due to *Lachlan* and not to *Scott*, they would have practised a gross Fraud.

[The VICE-CHANCELLOR:—If *Scott* and *Lachlan* had each applied to the Commissioners for the Money, and they had paid *Lachlan*, could *Scott* have maintained a Bill against them?]

If the Commissioners had paid *Scott*, *Lachlan* clearly could not have maintained an Action against them for the Money. The Plaintiff has put his own construction on what was the effect of the Charter-party; for he took the Assignment of August 1833 from *Scott*, without *Lachlan* being a Party to it.

We submit that the Notice was not sufficient to intercept the payment of the Fund to *Scott*, and, therefore, that it remained in his order and disposition at the time of his Bankruptcy.

The VICE-CHANCELLOR:

The Question raised by this Motion, is a very simple one. The whole difficulty seems to have arisen from not sufficiently attending to the Machinery of the Case.

The Commissioners of the Navy, for their own Personal Convenience, chose to contract (as they were at liberty to do) with an Agent, and not with the Ship-owners themselves, as it is more easy to contract with one Person than with many. The effect of the Charter-party was that, when the Vessel had performed her Voyage, Mr. *Lachlan* would, at Law, have a right

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to demand from the Commissioners the Sum payable upon the Charter-party, and Mr. *Scott* would have a right to receive, from *Lachlan*, the Sum which the Commissioners had paid to *Lachlan*: and, unless there were some special Circumstances, *Scott* could have no right whatever to file a Bill against the Commissioners, and ask that they, in the first instance, should pay the Freight to him. If a Bill had been filed, representing that the Voyage had been performed, and praying that the Commissioners might be ordered to pay the Money to *Scott*, the Commissioners might have, successfully, demurred to the Bill; for they would have a right to say that *Lachlan*, their Covenantee, was the Person to receive the Money.

I am willing to admit that there might be such a state of Circumstances as would justify *Scott* in coming into Equity against the Commissioners; but no such Circumstances have yet arisen. The consequence, therefore, is that the Commissioners are only liable, at Law, to pay *Lachlan*: and, being only liable, at Law, to pay *Lachlan*, *Scott* could only assign that which he had a right to, that is, a right to receive the Freight from *Lachlan*, when *Lachlan* himself had received it. Therefore, I am of opinion, that Notice to *Lachlan* was quite sufficient to put this Debt out of the order and disposition of *Scott*.

Supposing that there was any doubt upon the Question, which I think there is not, I ought to grant the Motion*.

* Affirmed by Lord *Brougham*, C., on the ground that, whatever the right might be, the Money ought to be secured.

1833:
14th Dec.

Will.
Construction.

Testator gave the Interest of a Fund to his Wife for Life, and after her death, to such of his four Daughters as should be *then living*, in equal Shares, during their respective lives; and *from and after the several deceases* of his Four Daughters, he gave one Fourth of the Capital to their respective Children. One of the Daughters died before the Widow, leaving a Child. Held that the Child became entitled, on the Widow's death, to have One-fourth of the Capital transferred to her.

WOODSTOCK v. SHILLITO.

WILLIAM BURROWS, by his Will dated the 22d of July 1805, devised all his Real Estates to his Wife and two other persons, in Trust to sell the same, and he directed the Monies arising therefrom to be added to his Personal Estate and disposed of as after mentioned: and he directed his Personal Estate to be converted into Money, and then proceeded as follows: "And my Will is that all the Monies to be received by my Trustees and Executors as aforesaid, after the payment of all my just Debts, Funeral Expenses, and the Charges of proving and executing this my Will, shall be placed out, in the names of my said Trustees and Executors, on good Real or Government Security or Securities, upon Trust that they or the Survivors or Survivor of them, or the Executors or Administrators of such Survivor, shall and do pay the Interest and Dividends and Profits from time to time arising therefrom, unto my said Wife and her Assigns, for and towards her Maintenance and the Maintenance and Education of my three youngest Daughters, *Catherine, Sophia and Amy*, until their respective ages of 21 years or Marriage under that age; and, as and when my said Daughters shall respectively attain the age of 21 years, or shall be married under that age with the consent and approbation of my Executors, I give unto them, my said Daughters, the sum of 500*l.* each, out of the said Capital so by me directed to be placed out by my Executors as aforesaid, having already advanced to my other Daughter, *Mary Ann*, the Wife of Mr. *William Buller*, to the amount of the same sum of 500*l.*: and, as to the remainder of the said capital Sum,

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I direct the same to be continued on the same or such other Security or Securities as my Executors shall think proper, and the Interest, Dividends and Profits from time to time arising therefrom, to be paid into the proper hands of my said Wife, for her own use and benefit, during her natural Life; and, from and immediately after her Decease, I direct the said Interest and Dividends to be paid unto and amongst such of my said four Daughters *as shall be then living*, in equal Shares and Proportions, during their respective Lives; and, *from and after the several Deceases of my said Daughters*, I give one Fourth part of the said capital Sum, and one Fourth part of the Interest which shall be then due thereon, to the respective Children of my respective Daughters, (that is to say), one such Fourth part to the Child or Children of my said Daughter *Buller*, one other like Fourth part to the Child or Children of my said Daughter *Catherine*, one other like Fourth part to the Child or Children of my said Daughter *Sophia*, and the remaining Fourth part of the said capital Sum and Interest to the Child or Children of my said Daughter *Amy*, in such proportions and manner as they, my said Daughters, shall by their Will direct or appoint."

The Testator died in September 1806, leaving his Wife and his four Daughters him surviving.

In 1809 *Catherine* married *John Marsden*, by whom she had Issue one Child only. *Mrs. Marsden* died in 1814, and her Child in 1829. In 1814, *Sophia* married *William Woodstock*, but there was no Issue of the Marriage. The Testator's Widow died in 1830. *Mrs. Buller* had Issue seven Children, three of whom were

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SHILLITO:

Infants. The Testator's Daughter *Amy*, remained single.

The Bill was filed by Mr. and Mrs. *Woodstock*, Mr. and Mrs. *Buller*, and *Amy Burrows*, against the Personal Representatives of the Testator's Widow, the Personal Representative of the deceased Child of Mr. and Mrs. *Marsden*, and the Children of Mrs. *Buller*, praying that it might be declared that, under the Will, and by reason of the Death of Mrs. *Marsden* in the Lifetime of the Testator's Widow, the Female Plaintiffs became entitled, as the only Daughters of the Testator who were living at the Death of his Widow, in equal Shares, during their respective Lives and the Life of the Survivor of them, to the Dividends of the Stock in which the Testator's Estate had been invested.

Mr. *Marsden*, in his Answer, submitted that, on the Death of the Widow, he became entitled, as the Personal Representative of his deceased Child, to have one Fourth of the Stock transferred to him.

Mr. *Beames* and Mr. *T. H. Hall*, for the Plaintiffs, contended that the Will contained a distinct Gift to such of the Testator's Daughters as should be living at the Death of his Widow: that the Court could not reject the words *then living*: that one Fourth of the Stock vested in the deceased Child, in the Lifetime of its Mother; but, from the subsequent words in the Will, it was to be collected that there was to be but one period of distribution, which was the Decease of the surviving Daughter; and that, in the meantime, the Daughters were Joint Tenants. *Armstrong v. Eldridge* (a).

(a) 3 Bro. C. C. 215.

Sir *E. Sugden*, Mr. *Spence* and Mr. *Wray*, appeared for the Defendants; but

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SHILLITO.

The VICE-CHANCELLOR, without hearing them, said:

The question is, what is the meaning of the words: "From and after the several Deceases of my said Daughters?" They mean: "after the Deaths of my Daughters respectively." It is clear that the Testator meant to give to the Children the Share of their Mother, on her Death. Consequently the Defendant, *Marsden*, is now entitled to his Daughter's Share.

NEWELL v. TOWNSEND.

1834:

13th January.

Debtor and
Creditor.

THE Goods of a Partnership of which the Plaintiff and *J. N.* were Members, had been taken in Execution for a Debt due from *J. N.* to one of the Defendants. *J. N.* died before the Writ was delivered to the Sheriff. The Plaintiff obtained an *ex parte* Injunction to restrain the Sheriff from removing from the Partnership Premises, selling or intermeddling with the Effects of the Partnership.

Injunction granted to restrain the Goods of a Partnership from being taken in Execution for a Debt due from one of the Partners, who died before the Writ was delivered to the Sheriff.

Mr. *Pepys* and Mr. *Ching*, for the Defendant, now moved to dissolve the Injunction.

Mr. *Knight* and Mr. *Girdlestone*, jun., for the Plaintiff, cited *Taylor v. Fields(a)*; and *Barker v. Goodair(b)*.

(a) 4 Ves. 396.

(b) 11 Ves. 78.

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The *Vice-Chancellor* said that a Writ of Execution bound the Property in a Debtor's Goods, only from the Delivery of the Writ to the Sheriff (c), who was required to indorse, on the back of the Writ, the Day on which he received it: that, in this Case, the Property in the Goods had vested, at Law, in the Plaintiff, the surviving Partner, before the Writ was delivered to the Sheriff, and, therefore, the Defendant could have acquired no legal right to them.

Motion refused, with Costs.

(c) See 29 Car. 2, c. 3, s. 16.

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13th Feb.

Feme Covert.
Trust for
separate Use.

A Trust for the separate Use of a Woman, whether single or married, is valid.

DAVIES v. THORNYCROFT.

MILLICENT CROXTON, by her Will dated the 29th of September 1815, directed that her Executor should stand possessed of the sum of 600 l., part of her Personal Estate, in Trust to permit her Sister *Thomasin Croxton*, and her Niece *Elizabeth Humphreys*, during their joint Lives, to receive the Interest thereof to and for their own use, in equal Moieties; and, from and after the death of *Thomasin Croxton*, then upon further Trust, in case her Niece should survive her Sister, to pay and transfer the 600 l. and the Securities whereon the same might be then invested, unto her Niece, to and for her own sole and separate Use, independent of any Husband she might marry. And she directed that the Receipts of her Niece alone, whether covert or sole, should, from time to time, be good Discharges, to her Executor, for any sums of Money to which she might become en-

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titled under her Will. But, in case her Niece should die in the lifetime of *Thomasin Croxton*, unmarried and without Issue, then upon further Trust that her Executor should pay and transfer the 600*l.* and the Securities whereon the same might be then invested, unto and equally between and amongst the Children of her Executor and their respective Executors, Administrators and Assigns: Provided that, in case her Niece should marry in the lifetime of the Testatrix's Sister *Thomasin Croxton*, and should, afterwards, die in the lifetime of her said Sister, leaving a Husband or one or more Child or Children her surviving, and who should be living at the death of *Thomasin Croxton*, the 600*l.* should be in Trust for such Person as the Testatrix's Niece should, by Deed or Will, appoint, and, subject thereto, for her Children as therein mentioned. And the Testatrix appointed the Defendant *Thornycroft* her Executor.

The Testatrix died shortly after the date of her Will. The Executor proved the Will, and retained the Legacy of 600 *l.* out of the Testatrix's Personal Estate.

Elizabeth Humphreys, after the decease of the Testatrix, but in the lifetime of *Thomasin Croxton*, married the Defendant *John Foulkes*, and had several Children living. On the 6th of February 1832 *John Foulkes* was declared a Bankrupt, and the Plaintiff and the Defendants *J. Dodd* and *R. E. Davies* were chosen his Assignees.

By a Deed Poll, dated the 16th of February 1832, the Defendant *Elizabeth Foulkes*, in exercise of the power vested in her and enabling her to dispose of her separate Property, and for securing, to the Plaintiff, the

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repayment of 293*l.* in which *John Foulkes* was, at his Bankruptcy, indebted to the Plaintiff, appointed and assigned, to the Plaintiff, 293*l.*, part of the Legacy of 600*l.*, and also the sum of 14*l.* 13*s.* annually, during the lifetime of *Thomasin Croxton*, to be issuing and payable out of the Moiety of the Interest of the 600*l.* to which *Elizabeth Foulkes* was entitled under the Will.

Thomasin Croxton died in January 1835.

The Bill alleged that the Defendants pretended that *Mrs. Foulkes*, being a feme coverte, had no power to charge the Legacy, and that the Limitation, in the Will, to her separate use, was void and inoperative as against her Husband. Whereas the Plaintiff charged the contrary.

The Bill prayed that it might be declared that the Deed Poll was a good Appointment, and that the Defendant *Thornycroft* became and was a Trustee, for the Plaintiff, of the Legacy or the Security on which it was invested, to the extent of 293*l.*; and that he might be ordered to pay 293*l.*, with Interest since the death of *Thomasin Croxton*, to the Plaintiff.

The Defendant *Thornycroft* put in a general Demurrer.

Mr. *Wigram* and Mr. *Parry*, in support of the Demurrer, relied on the Judgment of Sir *C. Pepys*, M. R. in *Massey v. Parker* (a). They also cited *Woodmeston v. Walker* (b), *Jones v. Salter* (c), and *Brown v. Pocock* (d).

(a) 2 M. & K. 174. See particularly 182. (c) 2 R. & M. 208.
 (d) Ibid. 210.

(b) 2 R. & M. 197.

[The VICE-CHANCELLOR:—Those Cases proceeded on this, that the policy of the Law being in favour of the Power to assign, the Courts will not permit that Power to be restrained by a fetter which is to take effect on a subsequent Marriage; and the Cases of *Barton v. Briscoe* (e), and *Newton v. Reid* (f), proceeded on the same principle (g). But this is a different Case.]

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Mr. Knight and Mr. Walker, in support of the Bill:

In *Massey v. Parker*, it was not necessary to decide the present question. It was held that the Control alluded to in the Will, was the Control of the Mother of the Grandchildren, and not the Marital Control. The *Master of the Rolls* says: "It is immaterial to consider what effect the words might have had, if used with reference to future Husbands of her Grandchildren, because I am of opinion that they are, in this Case, used with reference, not to any Control of such future Husbands of the Grandchildren, but to the possible Control of their Mother." Therefore, every thing that was said afterwards, was extra-judicial. Besides, the language used in the subsequent part of the Judgment, is not susceptible of the interpretation that has been put on it. When His Honor uses the words *Restriction* and *Fetter*, he means the Restraint on Alienation. The Trust for the separate Use of a married Woman, is not a Restriction or a Fetter, but a Guard: it increases her power. Nothing short of an Act of Parliament can say

(e) Jac. 603. (f) *Ante*, Vol. IV. p. 141.

(g) The same doctrine was laid down, by The Vice-Chancellor, in deciding on a Demurrer in *Johnson v. Freeth*, 2 March 1836. Mr. Lloyd for the Demurrer, Mr. Chandless for the Bill.

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that Trusts for the separate Use of unmarried Women cannot be created. *Simson v. Jones* (h); *Anderson v. Anderson* (i).

Mr. Wigram, in reply :

Neither in the statement of the Case, nor in the arguments in *Massey v. Parker*, nor in the Judgment is there a word said as to the Restraint on Alienation. The *Master of the Rolls*, in the first paragraph of his Judgment, which was a written Judgment, says : " Two questions are raised by this Demurrer : first, whether the Testatrix has, by her Will, given the Income of the Fund in question, to the separate Use of her Grand-daughter *Eliza* ; and, secondly, whether, if she intended so to do, such intention is now to be carried into effect." And His Honor, after deciding the first question, proceeds to give his judicial Opinion on the second, which he terms the more important question, namely, whether the intention to give the Income for the separate Use of the Grand-daughter, if sufficiently expressed, could, under the circumstances, have effect given to it, so as to deprive the Husband of his ordinary right to the Property. With respect to the word " Fetter," the object of the Trust for the separate Use and of the Clause against Anticipation, is the same, namely, to secure the Property for the benefit of the Wife. The *Master of the Rolls*, after saying that it was decided in *Brandon v. Robinson* (k), that an attempt to fetter the power of Disposition of a Male Legatee, could not succeed, and that it was established, by *Woodmeston v. Walker* and *Brown v. Pocock*, that the same

(h) 2 R. & M. 365.

(i) 2 M. & K. 427.

(k) 18 Ves. 429.

rule applied to an unmarried Female Legatee, proceeds to reason on the Trust for separate Use. If *Woodmeston v. Walker, Brown v. Pocock and Jones v. Salter*, are rightly decided, the Decision in *Massey v. Parker* is an unavoidable consequence from them. Suppose a Woman about to marry, to have Property of three Descriptions: 1st. Property held in an ordinary way: 2dly. Property held for her separate Use, without a Clause against Anticipation: and, 3dly, Property subject to a Clause against Anticipation. The first class of Property would, by the act of Marriage, become the Property of her Husband. So would the third, according to the Cases last referred to. Why should the second be in a different predicament? The Decisions in the Cases last referred to, show that the Will of the Donor is not sufficient to contravene the general rule of Law which gives to a Husband all his Wife's Property. The decision in *Massey v. Parker*, merely assimilates the Property of the second Class to Property of every other kind, and is, for that reason, a sound Decision, unless something in the way of Inconvenience can be urged against it. But that argument has no place here. The argument *ab inconvenienti* bears all the other way. Nothing is so convenient as uniformity in Law. Nothing so inconvenient as merely arbitrary distinctions. A Woman being about to marry knows she must settle her general Estate, if she desires to exclude the Marital Control, and she acts accordingly. What principle of convenience can recommend a different Rule in the case of Property settled to her separate Use?

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THE VICE-CHANCELLOR:

I have not the slightest doubt upon the question.

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I have always understood that it is lawful to give Property to the separate Use of a Woman married or unmarried, and the Practice of the Profession has been according to that Opinion, without any variation (1): and although it is inferred, from some of the expressions used by the present *Lord Chancellor* when *Master of the Rolls*, in *Massey v. Parker*, that such was not his Opinion; yet what was said in that Case must not be taken as a Decision on the question: for it was not necessary to enter into the Point: and His Lordship seems rather to be addressing himself to the question, Whether there can be a restraint on Anticipation, than to the question, Whether there can be a Limitation to the separate Use of a Woman? The Cases of *Newton v. Reid*; *Barton v. Briscoe*; *Jones v. Salter*; *Woodmeston v. Walker*, and *Brown v. Pocock*, are all Cases in which the only question was whether, if the Court admits Property to be settled to the separate Use of a Woman, it will also admit of her being restrained from disposing of it. When the Courts have decided that it is inconsistent with a disposition to her separate Use, that she should be restrained from disposing of the Property, they have admitted that it may be given to her separate Use. If, besides the known practice of Conveyancers, Cases are required, the Case of *Simson v. Jones* is decisive. There Leaseholds were given for the separate Use of a Female Infant, absolutely, in the event of her Marriage. She Married under Age, and consequently the Trust for her separate Use became absolute. Upon her Marriage a Settlement was made, with a power of Sale to Trustees. They made a contract to sell. The objection to the

(1) See *Horsman's Precedents*, 3d edit. vol. 1, p. 29, and vol. 2, p. 836. 1122-1131; and 3 *Wood's Conveyancing*, 459. 821, 822.

Title under the Settlement, would have been futile, if the Property could not have been given to the separate Use of the Wife. In that case, it would have been competent to the Husband to assign the Trust of his Wife's Term, according to Sir *E. Turner's Case* (m): which Case shows that, so early as 33d Car. 2, the Law of this Court was, not only that the Husband might assign the Trust of his Wife's Term, but that a Term might be assigned in Trust for her separate Use. In *Simson v. Jones*, no question about the Title could ever have arisen, if no such thing could exist as a Trust for the separate Use of a Woman who afterwards marries. Therefore, the decision that the Title was bad, assumed, as its foundation, that there was a Trust for the separate Use of the Wife, and that she, after attaining 21, could have exercised the power of Disposition which is inherent in the very nature of separate Property.

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I should be sorry to have it thought that I had any doubt on the question. I wish it, however, to be understood that I take, as the foundation of my Decision, the supposition that the *Lord Chancellor* has not decided otherwise.

Demurrer over-ruled.

(m) 1 Vern. 7.

1836 :
20th Feb.

JAMES v. HERRIOTT.

Demurrer.
Bill of
Discovery.
Pleading.

A Bill of Discovery is demurrable, if the words "stand to and abide such Order and Decree thereon" are inserted in the Prayer of Process.

THIS was a Bill of Discovery. The Prayer of Process contained the Words, "Stand to and abide such Order and Decree therein;" and, on that account, the Defendant demurred.

Mr. *Parry*, in support of the Demurrer, cited *Rose v. Gannel* (a), and *Close v. Froggatt* (b); in which a Demurrer to a Bill of Discovery was allowed on the same ground.

Mr. *Lane*, in support of the Bill, relied on the *dictum* in *Angell v. Westcombe* (c), that the words in the Prayer of Process: "To stand to and abide such Order and Decree," &c. are inserted by the Clerk, and do not make the Bill a Bill for Relief.

The VICE-CHANCELLOR:

The words referred to in *Angell v. Westcombe*, were not necessary for the purpose of the Decision. The words: "Stand to and abide such Order and Decree," do make the Bill a Bill for Relief.

Demurrer allowed.

(a) 3 Atk. 439.

(b) MSS. Excheq. H. T. 1826. The Demurrer was argued by Mr. *Martin* and Mr. *Bellasis*.

(c) *And*, p. 30.

HUNTER v. ——— *.

1834 :
16th January.

Practice.
Costs.

A MOTION having been made before The Lord Chancellor, on the part of the Plaintiff, to commit the Defendant's Solicitor, and that Motion having been refused with Costs, the Solicitor, on Affidavit that he had made various efforts, but unsuccessfully, to serve the Plaintiff with the Order under which he was entitled to Costs, now moved that service of the Order on the Plaintiff's Clerk in Court, might be deemed good Service.

Personal service of an Order for Payment of Costs by a Plaintiff to a Person not a Party to the Suit, will be dispensed with where the Plaintiff cannot be found.

Mr. *Beames*, in support of the Motion, cited Wyatt's Pract. Reg. 250, and Beam. on Costs in Eq. 250, observing that the Order was, in this Case, on the same footing as the Subpœna, which was the Process to compel payment of Costs as between the Parties to the Suit.

The *Vice-Chancellor* made the Order.

* *Ex relatione.*

1834 :
21st January.

Defendant.
Exceptions.
New Orders.

The Master being about to report the Defendant's Third Answer insufficient, he put in a Fourth Answer, and then moved to stay the Report. Motion refused, the Court having no right to deprive the Plaintiff of the benefit of the Tenth Order.

RUSSELL v. DIGHT.

THE First and Second Answers put in by the Defendant, had been, successively, reported insufficient. He then put in a Third Answer, which, was referred back upon the original Exceptions. The *Master* being about to report that that Answer also was insufficient, the Defendant put in a Fourth Answer; and thereupon,

Sir *E. Sugden* and Mr. *Wakefield*, for the Defendant, moved that all further Proceedings under the last Order of Reference, might be stayed. They said that though, under the 10th of Lord *Lyndhurst's* Orders, the *Master* might, on the Third Answer being reported insufficient, examine the Defendant on Interrogatories, it was only for the purpose of obtaining his Answer; and as the Defendant had put in his Fourth Answer, the Plaintiff had obtained all that he could require, and, therefore, the Proceedings in the *Master's* Office ought to be stayed.

Mr. *James Russell*, for the Plaintiff, said that, if the Motion were granted, the Defendant would be deprived of the benefits to which he was entitled under the 10th Order.

The VICE-CHANCELLOR :

I am of opinion that the Fourth Answer was irregularly filed, and that I have no authority to make the Order.

Although, in a common Case, a Defendant is at liberty to put in an Answer as soon as he has an inti-

mation of the *Master's* opinion that his Answer is insufficient; yet he is not at liberty to do so in a Case where the Plaintiff may derive some benefit by the Judgment of the *Master*. Now, under the 10th Order, some advantage has accrued to the Plaintiff by the report that the Third Answer is insufficient, which I am not at liberty to deprive him of; and, therefore, I shall refuse the Motion with Costs.

1834.

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WATERTON v. CROFT.

1834:
22d January.

THE Plaintiff claimed to be entitled to an Estate called *Woodlands*, as eldest Son and Heir of *Christopher Waterton* deceased, who, as he alleged, died intestate as to it.

Practice.
Pleading.

In 1824 a Bill had been filed, (which was afterwards amended,) by *James Croft* and *Thomas Croft*, against *Alexander Baring*, the Plaintiff and several other Parties, alleging that the Estate had been well devised by a Codicil to *Christopher Waterton's* Will, and praying that the Codicil might be established and the Trusts thereof performed. The Plaintiff and some of the other Persons who were named as Defendants to that Bill, never appeared to it, and, in fact, were never served with Process for that purpose.

A Bill was filed against *A.* and others; but, before he was served with a Subpœna, he went Abroad. The Bill was then amended, by stating that *A.* was out of the Jurisdiction, and a Decree was made. *A.* then filed an *Original* Bill to impeach the Decree, on the ground that he

was in *England* when the former Bill was filed but was not served with Process. The Defendants demurred on the ground that the Decree could not be impeached except by a *Supplemental* Bill in the first Suit. Demurrer over-ruled.

Practice.—The Court still has jurisdiction to make an Order for Time to answer on the over-ruling of a Demurrer.

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The Decree in that Cause was made on the 18th of November 1828, and, thereby, the Codicil was established, and the Trusts were directed to be performed, and the Estate was ordered to be sold. In December 1833, the Bill in this Cause was filed against *James and Thomas Croft* and the other Persons who were named as Defendants in *Croft v. Baring*, stating to the effect before mentioned, and that, at the time of filing the Bill in *Croft v. Baring*, the Plaintiff was in *London*, and that, shortly afterwards, he went to reside at *Ghent*, in *Flanders*: that he returned to *England* in or about October 1826, and resided some time at *Liverpool*: that, on or about the 16th of November 1826, he again left this country and went to *Demerara*, and resided out of the Jurisdiction of the Court until after the Decree in *Croft v. Baring*, and, in fact, he had never been in this country since the 16th of November 1826: that, if he had been served with Process to appear to and answer the Bill in that Suit, he would have appeared thereto, and have defended his Rights and Interests in the Estate called *Woodlands*: that he had been advised that, inasmuch as the Decree was made in his absence, the same was not binding upon him, and that his Rights and Interests in the Estate were wholly unaffected thereby: that he was unable to proceed, at Law, to recover possession of *Woodlands*, because the Legal Estate was outstanding in certain Mortgagees: that *James and Thomas Croft* were about to sell the Estate under the Decree: that the Codicil was not duly executed and attested, and that part of the Estate was purchased by the Testator after the date of the Codicil. The Bill prayed that it might be declared that *Christopher Waterton* died intestate as to *Woodlands*, and that, upon his death, the Plaintiff became entitled thereto as his Heir-at-Law,

subject to the Incumbrances thereon: and, (if necessary with a view to such declaration), that the Validity of the Codicil might be tried at Law: and that it might be declared that the Decree in *Croft v. Baring* was not binding upon the Plaintiff and that his Rights and Interests in *Woodlands* were unaffected thereby, and that he was entitled to the Possession thereof, notwithstanding the Decree; and that the Sale thereby directed might be stayed.

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James and *Thomas Croft* demurred to the Bill for want of Equity; and because it was not competent for the Plaintiff to impeach the Decree in *Croft v. Baring* by an Original Bill, but he should have taken the proper Measures or Proceedings, in that Cause, for that purpose.

Sir *Edward Sugden* and Mr. *Barber*, in support of the Demurrer:

It must have been sufficiently stated and proved, in *Croft v. Baring*, that the Plaintiff was out of the Jurisdiction. The Court may establish a Will, notwithstanding the absence of the Heir. *Williams v. Whinyates* (a).

(a) 2 Bro. C. C. 399. Lord *Redesdale*, however, says: "If the Heir-at-Law of a Testator who has devised a Real Estate on Trusts, should be out of the Jurisdiction of the Court, and that fact should be charged and proved, the Court will proceed to direct the execution of the Trusts, upon full proof of the due execution of the Will, and of the sanity of the Testator; though that Evidence cannot be read against the Heir if he should afterwards dispute the Will, and the Court, therefore, cannot establish the Will against him, or in any manner insure the Title under it against his Claims." Treat. Plead. 4th edit. 173.

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But this Demurrer does not depend upon the Decree being right or wrong, but upon its being what it is. The question is, whether a Defendant who was not within the Jurisdiction when the Decree was made, can file an Original Bill praying for a Decree diametrically opposite to that which has been pronounced? As he was a Party to the Cause, and the Decree was made in his absence, the Court must presume that his absence was regularly proved. He might, even after the Decree, have put in his Answer and have had the Cause reheard, or appealed from the Decree, in the same manner as he might have done if he had been present when the Decree was made. But, as he was a Party, he cannot file an Original Bill, though he might have filed a Supplemental Bill. He is bound by the Decree, but he has an opportunity of raising again the Questions in the Suit. An Original Bill may be filed to set aside a Decree on the ground of Fraud: but that is not the ground in this Case. If an Original Bill could be maintained, there would be one Decree declaring the Will well proved and directing the Trusts to be carried into execution, which would bind every one but the Plaintiff, and there would be another Decree declaring the Will not proved; so that there would be two inconsistent Decrees. If this Cause had been set down before The *Master of the Rolls*, he could not have reversed your *Honor's* Decree. The Plaintiff never can withdraw from having been a Party to the Suit. *Giffard v. Hort (b)*. There the Plaintiff was not a Party to the original Suit, but came in by succession to the Party who was bound by the Decree, and it was held that he could not file an Original Bill, but must file a Supplemental Bill for the purpose of

(b) 1 Scho. & Lef. 386.

appealing from the Decree. This Case is much stronger than that; for, here, the Plaintiff was a Party to the original Suit.

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[The VICE-CHANCELLOR:—I do not understand whether it was alleged that the Plaintiff was out of the Jurisdiction at the time of *filing* the Original Bill. If he was within the Jurisdiction at that time, and was not served with a Subpœna, he is not bound by the Decree.]

If there is any doubt upon that point, the Court may refer to its own Records. But, taking it for granted that the Plaintiff was properly alleged to be out of the Jurisdiction, the Decree which declared the Codicil well proved, would have been improper, if the absence of the Heir had not been regularly proved. Every Court must presume in favour of the validity of its own Decree: therefore, either the Bill must have been taken *pro confesso* against the Heir (which is not alleged), or he must have been duly stated and proved to be out of the Jurisdiction.

[The VICE-CHANCELLOR:—It appears, by the Office Copy of the Bill, which has been handed up to me, that, when the Original Bill was filed, the Plaintiff was within the Jurisdiction, and that the Bill was, afterwards, amended by stating him to be out of the Jurisdiction: then the question is, whether he might not have moved to have the amended Bill taken off the File, as stating a fact that happened after the filing of the Original Bill?]

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On looking at the office copy of the Bill in *Croft v. Baring* (which it was agreed I should look at), I see no reason to alter my opinion. It appears that the fact of the Plaintiff being out of the Jurisdiction, was introduced by way of Amendment; but it does not appear at what time the Amendment was made. If the Plaintiff was within the Jurisdiction at the time when the Bill in *Croft v. Baring* was filed, it was not competent to the Plaintiffs in that Suit, to amend their Bill by stating that he was out of the Jurisdiction. They ought to have filed a Supplemental Bill, stating that, since the filing of the Original Bill, the present Plaintiff had gone out of the Jurisdiction of the Court.

Demurrer over-ruled.

ON the over-ruling of the Demurrer the Defendants' Counsel applied for time to answer. Mr. *Wigram* objected that, under the Orders of 1833, the *Vice-Chancellor* had no Jurisdiction to make an Order for time to answer. The *Vice-Chancellor* said he considered that he had Jurisdiction to allow the time, as part of the Order over-ruling the Demurrer; and that it was not a Case contemplated by the Act*: and, accordingly, His *Honor* allowed the Defendants Six Weeks time to answer.

* 3 & 4 Will. 4, c. 94, s. 13.

LANCASTER v. LANCASTER.

1834:
23d January.

THIS was a Bill to perpetuate the Testimony of Witnesses to a Will. The Defendant had been taken on Attachment for want of Answer, and committed to the *Fleet*.

Practice.
Witness.

Mr. *Cooper*, for the Plaintiff, now moved for liberty to sue out a Commission to examine the Witnesses, as if the Cause were at issue, saying that the Defendant still refused to put in his Answer. He cited *Coveny v. Athill* (a), and *Frere v. Green* (b).

Leave given to Plaintiff, before Answer, to sue out a Commission in a Suit to perpetuate Testimony, the Defendant having been attached, and still refusing to answer.

The *Vice-Chancellor* made the Order on the authority of the Case in *Dickens*.

(a) 1 Dick. 355.

(b) 19 Ves. 319.

WEAVING v. COUNT.

1834:
28th January.

THIS was a Bill of Foreclosure. The Mortgagor had taken the benefit of the Insolvent Debtors' Act. The Provisional Assignee of the Insolvent Court (who was made a Defendant) by his Answer, submitted whether, by force of the Act or otherwise, the Estate became

Costs.
Insolvent.

gagor and the Provisional Assignee of the Insolvent Court who claims no Interest, the Plaintiff must pay the Costs of the Assignee and add them to his Debt.

In a Foreclosure Suit against an Insolvent Mort-

W. Tra. 1. Han 303. 1. M. 272.

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vested in him for the benefit of the Creditors ; and disclaimed all Interest other than such (if any) as might be vested in him, as Provisional Assignee, in Trust for the Creditors : and hoped that the Court would take care of the Interest of the Creditors.

The *Vice-Chancellor* made an Order, as to the Costs of the Provisional Assignee, similar to that in *Woodward v. Haddon (a)*, and on the same ground.

Mr. *Spence* for the Plaintiff.

Mr. *Reynolds* for the Provisional Assignee.

(a) *Antd*, Vol. IV. p. 606.

LE JEUNE v. BUDD.

JOHN GILLBANK, Victualler, by his Will dated the 9th of April 1829, devised to *George Budd* and *Thomas Clayton*, all his Freehold Estates in Trust to sell, and declared that the Proceeds should be deemed part of his Personal Estate; and he gave the residue of his Personal Estate to the same Persons, in Trust to invest the same and also the Proceeds of his Real Estate, in the Three per Cent. Reduced Annuities, and to stand

1834 :
29th and 30th
January.

*Legacy.
Consent to
Marriage.*

Testator directed his Trustees to pay, to his Daughters, their Portions on their marrying with the Consent, in Writing, of his Trustees first had and obtained; and, on their marrying without such Consent, that the Trustees should stand possessed of their Fortunes, in Trust for their separate use, for Life, with Remainder to their Children. *A.* proposed to the Trustees to marry one of the Daughters, who was an Infant. The Terms, as communicated to her by one of the Trustees, were, that 500*l.* should be paid to *A.*, on his marriage, out of her Portion, and that the Remainder should be invested, in the names of Trustees, for her sole use and benefit, the Interest to be paid to her only. The Daughter accepted the Proposals, and asked the Consent of the Trustees. The same Trustee then wrote a Letter, to the Daughter, saying that he and his Co-Trustee had not then signed the Consent, *but were ready to do so as soon as requisite*; and a Draft was prepared by which (subject to the payment of the 500*l.* to the Husband) the Portion was settled on the intended Husband during his solvency, then on the intended Wife, for her separate use, for Life, with Remainder to the Children, with Remainder to the Survivor of the intended Husband and Wife. *A.* having made certain arrangements for the disposal of the 500*l.*, which the Trustees disapproved of, the Trustee who had written the Letter, refused to look at the Draft of the Settlement, saying he should expect *A.* to make some other Proposals respecting the disposal of the 500*l.* Another arrangement was accordingly made and communicated to the Trustee, but he took no notice of it, and his Name was struck out of the Settlement; and the Marriage (to which his Co-Trustee had duly consented) was had, without further communication with him. Held that the Letter was a sufficient Consent on his part to the Marriage.

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possessed of the Stock in Trust to transfer the same equally among his Children, *Haveill, John, Emma Sophia and Hannah*, the Shares of his Daughters to become vested in them at 21 or Marriage; and he appointed *Budd and Clayton* Executors of his Will and Guardians of his Children during their Minorities.

The Testator, by a Codicil bearing even date with his Will, after reciting that he had directed, by his Will, that the Shares of his Estate and Effects therein bequeathed to his Daughters, should be transferred to them at 21 or Marriage, declared that his Trustees should stand possessed of the Stocks and Funds so bequeathed to his Daughters, until they should respectively be married *with the Consent and Approbation in Writing first had and obtained of his Trustees* or the survivors or survivor of them, and should, after the vesting of such Shares and until such Marriage, pay to his Daughters the Interest and Dividends of their Shares; and that, on the respective days of Marriage of his Daughters *with the Approbation in Writing of his Trustees as before mentioned*, the Trustees should transfer to them the Shares of his Estate and Effects bequeathed to them by his Will; but, in the event of his Daughters or either of them being married without the Consent of his Trustees as aforesaid, he directed the Trustees to stand possessed of her or their Share or Shares for her or their separate use for Life, and, after the decease of either of his Daughters, that the Interest and Dividends of her Share should be applied for the Education and Maintenance of her Children, until they attained 21, with benefit of survivorship, at which period he directed that the Share or Shares to which his Daughters were

entitled for Life, should be divided, equally, among their respective Children, and, in case his Daughters or either of them so marrying without the Consent of his Trustees, should die without Children, then that the Trustees should pay her or their Share or Shares to such Persons as his Daughters, or either of them, should by Will direct, and, in default of such direction, to such of his Children as should be living at her or their Decease, in equal proportions.

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The Testator died in February 1830. The Trustees sold his Real Estates, and invested the Proceeds and the residuary Personal Estate as directed by the Will. In March 1831, *A. P. Le Jeune*, a Music Master without Fortune, who, for some time before, had paid his addresses to the Testator's Daughter *Emma Sophia*, communicated to *Clayton*, (with whom he was well acquainted,) his desire to marry her; upon which *Clayton* said that, if *Le Jeune* would settle the greater portion of Miss *Gillbank's* Fortune upon her and the Issue of the Marriage, he should not object to the match: and *Clayton*, at *Le Jeune's* request, informed *Budd* of the proposal; and *Budd* replied that he saw no objection to the Marriage, provided a settlement of all Miss *Gillbank's* Fortune, except 500 *l.*, which might be advanced to *Le Jeune* as an Outfit on the Marriage, were made in the way proposed. In August 1831 *Le Jeune*, who had been, previously, introduced to *Budd* by Miss *Gillbank*, personally communicated to *Budd* his desire to marry her and to make the Settlement as suggested; to which *Budd* replied that he saw no objection and that he would write to Miss *Gillbank*, who was then in the country, on the subject. Accordingly *Budd*, on the

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31st of August 1831, wrote a Letter, to Miss *Gillbank*, as follows :

“ Since you were at my house last week I have seen Mr. *Le Jeune*, the Person whom you introduced to me as your intended Husband. The Proposals made, by Mr. *Le Jeune*, to Mr. *Clayton* and myself, are these : that, on his Marriage with you, we shall give to him a portion of 500 l., out of the Principal of your Money, *the remainder to be invested in the names of two Trustees for your sole use and benefit, the Interest of which to be paid to you only.* The Sum of 500 l. that he receives he will make what use he pleases of, as we cannot interfere with any Speculation he may please to enter into, any further than our opinion may be asked by him. He has promised me that, with the money so received, he will procure for you a suitable home, and such a one as you shall feel comfortable with. Now I wish you to answer this Letter by saying whether it is your particular wish to be married to Mr. *Le Jeune* under such circumstances ; if so, *you will, in your Letter, ask the Consent of Mr. Clayton and myself to the Marriage, by giving so much money and settling the remainder on yourself.* That being done, you will, also, name two Persons to be your Trustees under a Marriage Settlement. Upon the receipt of your Letter, any Arrangement you wish shall be immediately entered into.”

Miss *Gillbank* answered this Letter on the 2d of September, saying that she fully approved of *Le Jeune*'s Proposals, and requested the Consent of *Budd* and *Clayton* to the Marriage ; and she nominated them as Trustees of her Settlement.

A. P. Le Jeune, in contemplation of his Marriage and with Miss *Gillbank's* Approbation, arranged with his Uncle, *Joseph Le Jeune*, a Staymaker, to lend him, *J. Le Jeune*, the 500 *l.*, and that *A. P. Le Jeune* should take Apartments in his house, at a weekly rent; that Miss *Gillbank* should be taught the business of Staymaking, and that *Joseph Le Jeune* should pay her a Salary of 75 *l.* a year, for Seven Years. *Clayton* and *Budd*, when they were informed of this Arrangement, objected to it, on the ground that it would be injurious to Miss *Gillbank's* health, and for other reasons.

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On the 22d of September 1831, *Blake*, the Solicitor of the Trustees, had an interview with *Budd*, and then pointed out to him what he considered to be the proper Terms of the intended Settlement; and *Budd* approved of them and directed *Blake* to prepare the Settlement accordingly.

On the 26th of September, *Budd* wrote to Miss *Gillbank* as follows: "I beg to inform you that Mr. *Blake*, the Solicitor, has received every necessary Instructions to prepare the Marriage Deed, and every thing is now going on that can be done till your presence will be required to make it complete. Mr. *Clayton* and I have not yet signed the Consent, but we are quite ready to do so as soon as requisite, as we consider, from your Letters, that it is your wish, and that your happiness depends upon the proposed Union. Thus far things are arranged, and I am not aware any obstacle can possibly present itself to prevent your Marriage. That point being settled, you are quite free to act on your own opinion relative to Mr. *A. P. Le Jeune* embarking the 500 *l.* in the way proposed." *Budd* then mentioned the

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grounds on which he and *Clayton* thought that the proposed Arrangement was objectionable, and concluded as follows: "I am not aware that I shall have occasion to write to you again, as I suppose that, when every necessary Arrangement is made, a Summons from another quarter will be more cheerfully obeyed."

On the 29th of October, *Blake* called on *Budd* with the Draft, and said that he had prepared a Settlement as agreed on at their former interview, and in such a manner as he considered would be most beneficial to the Parties: and he was about to produce and read the Draft, when *Budd* observed that he disapproved of the Loan to *Joseph Le Jeune* and of *Miss Gillbank's* residing in his house after her Marriage, and said that he should expect other Proposals to be made by *A. P. Le Jeune* respecting the use he should make of the 500 *l* and the residence of himself and his intended Wife; and he declined to look at the Draft, but did not make any other objection to the Marriage.

On the 5th of November, *Miss Gillbank* wrote to *Budd* as follows: "Having understood that you now object to the Arrangement which had been previously agreed upon respecting the Sum to be paid to my intended Husband on the day of our Marriage, I am under the necessity of reminding you that the Affair has now proceeded so far with the Consent and Approbation of yourself and Mr. *Clayton*, that it is impossible for me to withdraw from or suspend the Engagement for any length of time, without the greatest injury to my happiness. As I feel well assured, from the kind care and attention to my welfare and happiness which you have always evinced, you would not willingly retard or im-

pede them by longer objecting to the Terms of the Marriage as previously agreed upon, I trust that, ere this, you will have reconsidered the subject and decided that you cannot and ought not, in justice to myself and Mr. *Le Jeune*, attempt to alter those Terms to which you had, more than a month since, assented. As it is impossible for Mr. *Le Jeune* to arrange his plans of Settlement in Life in any other manner than that he has already communicated to you, and as I am now extremely anxious for the accomplishment of our Union, I hope you will favour me with a Letter, at your earliest convenience, allaying my anxiety on this subject and expressing your willingness to permit your name to remain in the Marriage Deed as a Trustee."

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In consequence of the disapprobation expressed by the Trustees, the Arrangement with *Joseph Le Jeune* was abandoned; and, on the 12th of November, A. P. *Le Jeune* wrote to *Budd* and informed him thereof, and added that he proposed to take suitable lodgings in some respectable house, and to invest in the Funds so much of the 500*l.* to be paid him on his Marriage, as would not be required as an Outfit, and that the residue of *Miss Gillbank's Fortune* would, of course, be settled on herself and family in the way agreed upon. *Budd* returned no Answer to either of the two last-mentioned Letters. On the 15th of November *Clayton* gave his Consent, in Writing, to the Marriage. On the 25th of November the Settlement was executed, *Budd's* name having been struck out, as a Trustee, and *F. Hutchinson's* name substituted for it.

The Trusts of the Settlement were to raise 500*l.* out of *Miss Gillbank's* Share of her Father's Estate and

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pay the same to *A. P. Le Jeune* for his own absolute use, and to pay the Interest and Dividends of the Residue to *A. P. Le Jeune*, until he should assign, charge or otherwise dispose thereof, or attempt or agree so to do, or become Bankrupt, or take the benefit of the Insolvent Debtors' Act, or do any other act whereby the Interest and Dividends would become vested in any other Person; and, on his doing any of the acts before mentioned, then, during the joint Lives of *A. P. Le Jeune* and his intended Wife, to apply the Interest and Dividends for her separate use, and, if he should survive her, then to apply the Interest and Dividends for the maintenance and support of *A. P. Le Jeune* and the Issue of the Marriage, or of the Issue alone, as the Trustees should think fit, and, after *Le Jeune's* Death, if Miss *Gillbank* should survive him, to pay the whole of the Interest and Dividends to her for her Life, and, after the Decease of the survivor, to stand possessed of the Principal, in Trust for the Children of the Marriage as *Le Jeune* and Miss *Gillbank*, during their joint Lives, should appoint, and, in default thereof, as the survivor should appoint, and, in default thereof, in Trust for the Children of the Marriage, and, if there should be no such Child, then in Trust for the survivor of *Le Jeune* and Miss *Gillbank* absolutely.

On the 28th of November, without any intimation given to *Budd*, the Marriage was solemnized, and, on the same day, *Budd* was informed of it by a Letter written to him by *Clayton*. Shortly afterwards, *A. P. Le Jeune* applied to *Budd* to concur with *Clayton* in transferring Mrs. *Le Jeune's* Fortune to the Trustees of the Settlement. *Budd* having declined to comply with that application, on the 14th of December 1831, (Mrs-

Le Jeune being still an Infant), the Bill was filed by Mr. and Mrs. *Le Jeune*, *Clayton* and *Hutchinson*, against *Budd*, praying that he might be ordered to make the transfer.

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Budd, in his Answer, said that he intended, and conceived that he must have expressed that the Settlement was to be on Mrs. *Le Jeune* herself, to her sole and separate use, and not on her Husband, who was not to have any Interest in her Fortune beyond the 500*l.*: that he understood the terms of the Settlement, as communicated to him by *Blake* at their interview on the 22d of September, to be conformable to the terms expressed in his Letter of the 31st of August, (that is to say) as being a Settlement of the whole of Mrs. *Le Jeune's* Fortune, except the 500*l.* for Outfit, for her separate use for Life, with Remainder to her Children in exclusion of her Husband: and that he never had the slightest notion of any other Settlement being in contemplation: that, whatever might be the legal effect of his Letters, he always considered that his formal Consent in Writing yet remained to be required and given, though he had no wish to interpose any obstacle to the Marriage and merely intended to use the control vested in him, before he finally gave his formal Consent, for the purpose, not only of securing the Settlement of his Ward's Fortune so as to exclude her Husband from any control over it, but also of regulating the disposition of the Sum to be advanced for Outfit: that *Blake* did not produce or show to him the Draft of the Settlement or explain to him the contents thereof: and he submitted whether the Marriage had been solemnized with his Consent and Approbation in Writing within the provisions of the Codicil, the condition annexed to his Consent in his Letter of the 31st of August not having been complied

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with. The Answer concluded with setting forth a Letter dated the 13th of December 1831, from Mrs. *Le Jeune's* Brothers to *Budd*, requiring him not to part with their Sister's Fortune, on the ground that she had married without Consent: and *Budd* submitted that they and their Sister *Hannah* were necessary Parties to the Suit.

In June 1832, the Bill was amended by making Mrs. *Le Jeune's* Brothers and Sister Defendants.

Mr. *Knight* and Mr. *Bichner*, for the Plaintiffs:

A Consent to a Marriage may be good, though it was not formally given, and even though the Party who gave it, may not have intended it to be final. *Budd*, in his Letters of the 31st of August and 26th of September, encouraged the Marriage, and gave an unconditional Consent in Writing to it, which he never afterwards could retract. The Testator did not require the Trustees to see to the propriety of the Settlement, but to the propriety of the Marriage. By the Codicil, the Trustees were not required to direct any Settlement to be made, but the Shares of the Daughters were given to them absolutely on their marrying with Consent. The Settlement alluded to in *Budd's* Letter of the 31st of August, would have been no Settlement at all; as it would have enabled Mrs. *Le Jeune* to give the whole of her Property to her Husband. The Trustees objected to the arrangement entered into with *Joseph Le Jeune*, and that arrangement was abandoned; still, however, *A. P. Le Jeune* was to have the 500 l. for Outfit. *Blake*, in his Evidence, swears that on the 22d of September he communicated to *Budd* the scope and effect of the intended Settlement, and that *Budd* assented thereto, and never required that the Property should be settled on

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Mrs. *Le Jeune* and her Children, to the exclusion of her Husband; but, on the contrary, that he assented to *Blake's* recommendation that Mr. *Le Jeune*, who had no Fortune of his own, should be permitted to receive the Interest of his Wife's Fortune during his life, as, in case she were to receive it, it might create discord between them. *Blake* further swears that *Budd* ultimately left it to him to prepare a Settlement upon the terms proposed, or in such other manner as he might, on further consideration, think more beneficial to Mr. and Mrs. *Le Jeune*, except that the 500 *l.* was to be paid to Mr. *Le Jeune*, immediately on the Marriage taking effect. At the interview which took place on the 29th of October, *Budd* did not object to the Settlement, which was a reasonable and prudent one: he, merely, disapproved of the Loan of the 500 *l.* to *Joseph Le Jeune*, and of Mr. and Mrs. *Le Jeune* going to reside with him after their Marriage; and that arrangement was subsequently put an end to. *Dashwood v. Bulkeley* (a); *D'Aguilar v. Drinkwater* (b); *Lord Strange v. Smith* (c); *Burleton v. Humfrey* (d); *Worthington v. Evans* (e); *Daley v. Desbouverie* (f); *Merry v. Ryves* (g).

Sir *E. Sugden* and Mr. *O. Anderdon*, for the Defendant *Budd*:

The question is, when and on what Terms *Budd* consented to the Marriage.

According to the Plaintiff's own statement, the Draft of the Settlement was to have been submitted to *Budd*.

(a) 10 Ves. 230.

(c) 1 Sim. & Stu. 165.

(b) 2 V. & B. 225.

(f) 2 Atk. 261.

(c) Amb. 263.

(g) 1 Eden, 1.

(d) Ibid. 256.

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The Settlement, however, was executed, and the Marriage was had, without any intimation given to *Budd Blake*, it is true, called on *Budd* with the Settlement, but did not read it to him, as he did not approve of it, but said he should expect other Proposals to be made by *Le Jeune*, respecting the use he should make of the 500 l.: and afterwards *Budd's* name was struck out.

According to the Case made by the Bill, the bulk of the young Lady's Fortune was to have been settled on herself and her family: and *Le Jeune*, in the Letter which he wrote to *Budd* on the 12th of November 1831, says: "The Residue of Miss *Gillbank's* Fortune will, of course, be settled *on herself and family* in the way already agreed upon." The argument for the Plaintiffs, is a departure from the Bill. It appears, from the Correspondence, that the Settlement that was intended, was a Settlement on the Wife for her separate use. The effect of that which has been executed, is to take away from the Wife the Enjoyment of the Property during her Husband's Solvency. The Property too is given to the Survivor, in the event of there being no Children of the Marriage. It is an unusual Settlement, and not that which *Budd* consented to.

The Cases cited do not apply; for, in this Case, there is no Forfeiture in the event of a Marriage without Consent.

Mr. *Pepys* and Mr. *Lloyd*, for the Defendants, the Brothers and Sister of Mrs. *Le Jeune*, said that, by the Codicil, a Provision was made for the Testator's Daughters, whether they married with or without the Consent of the Trustees: that the obtaining of the Consent, was

made a Condition precedent: and that, if *Budd* had given any Consent at all, the Condition on which it was given, had not been complied with; and, therefore, the Gift over in the Codicil, had taken effect. *Gillet v. Wray* (*h*).

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Mr. *Errington* appeared for the Infant Child of Mr. and Mrs. *Le Jeune*, who was made a Party to the Suit by Supplemental Bill.

THE VICE-CHANCELLOR:

The question is what is the effect of the Transactions between the Parties, having regard to the Provision in the Codicil?

It has been argued that the real object of the Testator in making the Codicil, was to secure a proper Settlement on his Daughter, through the Intervention of the Trustees. But the Testator has not directed that his Trustees should see to the making of any Settlement in the event of their Consent to the Marriage not being given, but has limited over the Property in a particular manner, which amounts to a Settlement, in that event; and there is an absolute Gift to the Daughters in the event of their marrying with Consent. [His *Honor* here read the Codicil]. It is plain, therefore, that what the Testator intended, was that the Trustees should exercise no control, except as to the Propriety of the Marriage. The Courtship commenced in the Spring of 1831. The first Meeting between the Trustees and *Blake*, took place in May or June of that year. Some conversation then took place respecting the proposed Marriage, but

(*h*) 1 P. W. 284.

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nothing definite was arranged. There having been a Proposal made that 500 *l.* should be advanced to the Uncle of the intended Husband, and that the young Lady should reside in his House and be taught the business of Stay-making, *Budd*, on the 31st of August 1831, wrote this Letter to her: [His *Honor* here read the Letter]. By the words: "On the receipt of your Letter, any Arrangement you wish shall be immediately entered into," he, of course, meant: "On the receipt of your Answer in the affirmative." It struck me that it might be questionable whether, on this Letter alone, there would not be strong ground for saying that there was a Consent in writing, if she wrote such an Answer as he suggested. On the 2d of September, Miss *Gillbank* wrote an Answer to *Budd's* Letter; and no one can deny that it was such an Answer as he must have anticipated. But the matter did not rest here; for, on the 22d of September, a Meeting took place between *Budd* and *Blake*: and, whatever took place at that meeting, whether *Budd* more or less distinctly understood what *Blake* said to him, on the 26th of September, *Budd* wrote this Letter to the young Lady: [His *Honor* here read the Letter]. It is quite plain, on the face of this Letter, that *Budd* supposed that some more formal Consent must be given by him and *Clayton* to the Marriage; but, at the same time, no other construction can be put upon it than that it was a Writing signed by *Budd* and consenting to the Marriage. Nothing in it holds out that his Consent was to depend upon the making of the Settlement in one way or another; but it was a complete unequivocal Consent. He tells Miss *Gillbank* that Mr. *Blake* had received every necessary Instruction to prepare the Marriage Deed, and that every thing was then going on that could be done till her

Presence should be required to make it complete. Miss *Gillbank* wrote an Answer to this Letter, in which she alluded to the Advice which *Budd* and *Clayton* had given her. The Advice which they had given her, was not as to the Form of the Settlement, but as to her living in the House of *Joseph Le Jeune*. Nothing had passed, between *Budd* and her, to which this Letter of hers could refer, except the Advice which he had communicated to her, in his Letter of the 26th of September, as to the Proposal of living in the House of *Mr. Joseph Le Jeune*.

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My opinion is that, on the 26th of September, *Budd* had given an unconditional Consent, which he could not afterwards withdraw.

The Arrangements that were to be made respecting the young Lady's Place of Residence and the disposal of the 500*l.*, were considered as formal merely, and not as Conditions. It is not necessary, therefore, to enter into the Cases, but only to say that, when an absolute Consent has been once given, the Party is not at liberty to retract it.

At the Meeting between *Blake* and *Budd* on the 29th of October, there was a Declaration, on *Budd's* part, that he did not desire to see the Draft of the Settlement, and *Blake*, therefore, had no other course to pursue but to complete the Settlement according to the original Instructions: and it does not appear that the Settlement actually made, was at variance with that originally proposed, except that *Budd's* Name was not found in it. The Letter of the 31st of August was not written by a Professional Person, and did not accurately point out

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any particular Terms of Settlement. All that it said was that Mr. *Le Jeune* was to have a Portion of 500*l.* out of the Principal of the Money, and that the Remainder was to be invested, in the Names of two Trustees, for Miss *Gillbank's* sole use and benefit, the Interest of which was to be paid to her only. All that was meant was that a Settlement should be made, giving Miss *Gillbank* an Interest for her Life. After the Interview of the 29th of October, Miss *Gillbank* wrote to *Budd* the Letter of the 5th of November, to which, as I understand, *Budd* never sent any Answer, though it did not hint at any objection to the Settlement, except with respect to the 500*l.* If *Budd* had objected to the Terms of the Settlement generally, he should have answered that Letter, and said that he thought the Settlement wrong. Then, on the 12th of November, Mr. *Le Jeune* wrote a Letter to *Budd*, in which he said that so much of the 500*l.* as should not be required for Outfit, should be invested in the Funds, and that the Residue of Miss *Gillbank's* Fortune should be settled on herself and Family in the way agreed upon. To this Letter also no Answer was returned. The Marriage took effect on the 28th of November, and, after the Marriage, Application was made to *Budd* to transfer the Fund; and the question is whether he was justified, in point of Law, in refusing to make the Transfer. *Budd's* objection is put upon this; not that the Settlement was wrong; but that he had not given his Consent. I do not think that there is anything, in the Settlement, so wrong as that a Trustee could reasonably object to transfer the Fund.

I am of opinion that the whole Defence as to *Budd*, utterly fails, and that his Conduct has made this Suit necessary. If the *Gillbanks* had not written their Letter

to *Budd*, they must have been made Parties in respect of their Interest. The Plaintiffs must pay their Costs, and also the Costs of the Infant; and those Costs and their own must be paid to them by *Budd*.

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MYTTON v. BOODLE.

THE Sum of 6,500 *l.*, (of which 1,500 *l.* belonged to *Moses Corbet* and the Residue was subject to the Trusts of his Marriage Settlement), was secured by a Mortgage of the Estates of *J. Mytton*, deceased, for a Term of Years which had become vested in *Moses Corbet*. The Plaintiff was the Eldest Son and Heir of *J. Mytton*.

1834 :
30th January.
Will.
Construction.

Moses Corbet, by his Will dated the 7th of March 1803, bequeathed 1,500 *l.*, therein mentioned to be remaining due to him by *J. Mytton*, then lately deceased, and secured upon all or some Parts of his Estates, to the Plaintiff, the Son of the said *John Mytton*; but, if the Plaintiff should die before he attained the age of 21 years, then the Testator bequeathed the 1,500 *l.* to certain other Persons in his Will mentioned: And the Testator, after stating that, if he should survive his Wife, he should, under the Trusts of his Marriage Settlement, become entitled to the Sum of 5,000 *l.* remaining due and secured upon all or some Parts of the Estates of *J. Mytton*, deceased, did, in case the 5,000 *l.* should, at any time, come to or vest in him or in any Person or Persons in Trust for him, bequeath the same to the Plaintiff, if he should attain the age of 21 years, but, if he should not attain that age, or die without leaving Issue Male of his Body living at his Death or born alive

Testator bequeathed 5,000 *l.*, to *A.*, if he attained 21, but if he should not attain that age, or die without leaving Issue Male, then over. Held that the 5,000 *l.* vested, absolutely, in *A.* on his attaining 21.

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afterwards, then the Testator bequeathed the 5,000 *l.* to certain other Persons in his Will mentioned. The Testator, by a Codicil, after reciting that, by the Death of his Wife, he had become entitled to the 5,000 *l.*, bequeathed the same to the Plaintiff, if he attained the age of 21 years, but, if he should not attain that age, or die without leaving Issue Male of his Body living at the time of his Death or born alive afterwards, then the Testator bequeathed 2,000 *l.* of the 5,000 *l.* to the Defendant *Rebecca Mytton* (the only Sister of the Plaintiff's Father), her Heirs, Executors, or Assigns, if she was alive at the time of his, the Testator's, Death; but, if she was dead, then he bequeathed the 2,000 *l.* and the remaining 3,000 *l.* of the 5,000 *l.* to *John Corbet*, since deceased, in Trust for his Children by his Wife, *Ann Corbet*, as should be alive at the time of his Death (except the Eldest Son who would be amply provided for otherwise): and the Testator bequeathed the 1,500 *l.*, also remaining due to him by *John Mytton* and equally secured upon all or some Parts of his Estates, to the Plaintiff; but, if the Plaintiff should die before he attained the age of 21 years, then the Testator bequeathed the last-mentioned Sum to certain other Persons therein mentioned.

The Testator died on the 28th of August 1809.

The Bill was filed in 1833, against the Personal Representatives of the Testator, and against *Rebecca Mytton*, and the younger Children of *John Corbet*, stating that the Plaintiff had attained 21 and had Issue Male, and that, in consequence, he was entitled, under the Will and Codicil, to the 6,500 *l.* absolutely, and to have the Mortgage Term assigned according to his Directions:

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that, being seized in Fee of the Mortgaged Premises, he had agreed to sell the same, and was desirous of having the Term assigned in Trust for the Purchaser and to attend the Inheritance: that the Defendants *Rebecca Mytton* and the Children of *John Corbet*, pretended that the Plaintiff was entitled to a Life Interest only in the 5,000*l.*, and that, if he should die without leaving Issue Male of his Body, the Bequest over to them would take effect; but the Plaintiff charged that, by having attained 21, he had become absolutely entitled to the whole of the 6,500*l.*, and that, for the same reason, the Bequest over had become incapable of taking effect. The Bill prayed for a Declaration that the Plaintiff was absolutely entitled to the 6,500*l.*, and that the Representatives of the Testator might be ordered to assign the Term as he should direct.

The Cause now came on to be heard as a Short Cause.

Sir *E. Sugden* and Mr. *Beales*, for the Plaintiff, cited *Beachcroft v. Broome* (a) and *Cuthbert v. Purrier* (b); and said that the 5,000*l.* was not to go over either in the event of the Plaintiff attaining 21, or in the event of his dying under that age, if he left Issue Male; and that his Issue would take the Estate out of which the Term was created.

Mr. *Knight* and Mr. *Stuart* for the Defendants, the Legatees over, said that there was no Gift of the 5,000*l.* to the Plaintiff, except on his attaining 21, and that he

(a) 4 T. R. 441.

(b) Jac. 415.

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then took a vested Interest, subject to be divested on his dying without leaving Male Issue (c).

Mr. *Dixon*, for the Testator's Representatives.

The VICE-CHANCELLOR :

According to the Construction contended for by the Defendants' Counsel, there would have been an Intestacy if the Plaintiff had died under 21 and had left Issue Male.

I am of opinion that the Testator did not intend the Legatees over to take, if the Plaintiff died under 21 leaving Issue Male; but that his clear intention was that, if the Plaintiff attained 21, he should have the 5,000 £, and, if he died under 21 leaving Issue Male, that he should also have the Legacy.

Declare the Plaintiff to be absolutely entitled to the whole 6,500 £.

(c) See *Lyon v. Mitchell*, 1 Madd. 467.

1834.

4th February.

*New Orders.
Construction.*

Where a Decree in a Cause in which previous References have been made, directs a Reference to the *Master in rotation*, the Decree will be carried to the *Master* to whom the previous References were made.

THE ATTORNEY-GENERAL v. SHORE.

MOTION that the Reference directed by the Decree to the *Master in Rotation*, might be declared null and void, and that the Reference might be made to the *Master* to whom the previous References in the Cause had been made (a).

(a) See 15th, 16th & 17th Orders of 1833.

Mr. Rolfe and Mr. Booth in support of the Motion.

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Sir E. Sugden, Mr. Knight and Mr. C. Romilly,
contrâ.

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The VICE-CHANCELLOR :

I am of opinion that the Language of the Decree is right. It is clear, from the Language of the 17th Order, that the *Master* in Rotation is the *Master* to whom the previous References in the Cause were made.

BURNELL v. THE DUKE OF WELLINGTON.

1834 :
5th February.

MOTION, before Decree, by the *Executor* of the late Duke of *Sutherland*, one of the Defendants, who died in July 1833, that the Plaintiff might, within a Month after the date of the Order to be made on the Motion, revive the Suit against the *Executor*, or, in default thereof, that the Suit might be dismissed as against the late Duke.

Practice.
Revivor.

Motion, before Decree, by the *Executor* of a deceased Defendant, that the Plaintiff might revive the Suit against him, or that the Bill might be dismissed, as against the Deceased, granted.

Sir E. Sugden and Mr. L. Lowndes, for the Motion.

The Plaintiff did not appear.

The Vice-Chancellor made the Order.

Reeves & Baker 13 Beav. 115. Norton v White 2 D. & G. 8. 678.

1834:
14th February.

LATTER v. DASHWOOD.

*Mortgagor and
Mortgagee.
Account.
Rests.*

A. conveyed his Estates to *B.*, in Trust to sell and pay off a Mortgage and other Incumbrances on the Estates, and to retain a Debt due to *B.*, and, until the Sale, to apply the Rents in keeping down the Interest on the Charges, and to pay the Surplus to *A.*

B. took a transfer of the mortgage, and entered into and remained in possession for 24 Years, but did not sell the Estates. For the first Ten Years the Rents were less than the Interest; but, afterwards, they exceeded it. *A.* filed a Bill for an Account of the Rents received by *B.*, with yearly Rests, and for a Re-conveyance of the Estates. But the Court refused to direct the Rests.

BY Indentures of the 18th and 19th of December 1798, certain Freehold and Leasehold Estates were conveyed and assigned, by the Plaintiff, to the Defendant, *Dashwood*, in Trust to sell, and, out of the Money arising therefrom, in the first place to pay off 1,500 *l.* and Interest secured by a Mortgage of the Estates to one *Hunt*, next to re-purchase an Annuity of 50 *l.*, secured upon the Estates to *Mary Pike*, and then to retain 700 *l.* and Interest due to himself, and, to pay the residue of the Monies to the Plaintiff: and it was provided that, until the Sale, the Rents of the Estates should be applied in payment of the Interest of the 1,500 *l.*, and in payment of the Annuity and the Interest of the 700 *l.*; and that, in case there should be any Surplus, the same should be paid to the Plaintiff. In June 1801, *Dashwood* paid off the Principal and Interest due to *Hunt*, and took a Transfer of the Mortgage. Shortly afterwards he entered into possession of the Estates, but never sold the same.

On the 4th of February 1815, Mrs. *Pike* agreed, with the Plaintiff, to accept of a sum of 808 *l.*, in lieu of her Annuity, and that that Sum, with Interest at 5 *l.* per Cent., should be considered as charged upon the Estates.

In 1820 the Bill was filed, charging that the Rents received by *Dashwood*, who still remained in possession

Nelson v Booth 3 DeG. & S. 120.

of the Estates, were sufficient, not only to keep down the Interest, but to discharge the Principal of the Sums charged thereon, and praying that an Account might be taken of such Rents, *with Annual Rests*, and that the Estates might be re-conveyed to the Plaintiff.

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The Decree, which was pronounced in 1823, directed an Account to be taken of the Principal and Interest due in respect of the Incumbrances, and of the Rents received or which, without wilful Neglect or Default, might have been received by *Dashwood*.

It appeared that, for the first 10 Years after *Dashwood* entered into possession of the Estates, his Payments exceeded his Receipts, and that, in every subsequent Year, his Receipts exceeded his Payments, but not to an amount sufficient to discharge the Principal due to him.

On the Cause coming on for further Directions,

Mr. *Knight* and Mr. *Sharpe*, for the Plaintiff, insisted that Rests ought to be made in taking the Accounts of the Rents received by *Dashwood*.

Sir *E. Sugden* and Mr. *Teed*, for *Dashwood*, said that he did not take possession of the Estates as Mortgagee, but under the Trusts of the Release of 1798; and that the Court could not allow him Interest on the Balances in his favour; and, therefore, that Rests ought not to be made in taking the Account.

The VICE-CHANCELLOR, after stating the Trusts of the Release of 1798, said :

In 1801 *Dashwood* took a Transfer of the first Mortgage and entered into possession of the Estates under

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DASHWOOD.

the Provisions of the Release of 1798, and he remained in possession for 24 Years. The Bill asks, in terms, that the Account of the Rents received by him may be taken with Annual Rests.

It was to be inferred, from the Language of the Release, that the Rents were more than sufficient to keep down the Interest on the Incumbrances. But it appears that, for the first 10 Years, they were not equal to the Interest, although there was no Default or Misapplication on the part of the Defendant. Afterwards, however, there was a Surplus.

In *Davis v. May (a)*, Sir *W. Grant*, Master of the Rolls, after much Consideration and referring to Precedents, says: "The Direction to take the Account with Rests, is not of course. From Precedents of Decrees that I have seen, I collect that the usual course is not to give that Direction. There is no instance of a Decree in the Form now prayed, with Rests from a particular period of the Account when the Arrear of Interest was discharged. Here the Special Circumstances are against such a Direction; which, it is admitted, would be improper from the beginning of the Account, while there was an Arrear of Interest."

It appears to me, therefore, that I cannot authorize the Account to be taken with Rests, in this Case.

(a) 19 Vcs. 383.

MORTARA v. HALL.

THIS was a Suit for the Administration of the Estate of *James Alexander Nisbett*, who attained 21 in June 1831 and died in the same year.

1834 :
14th February.

Infant.
Necessaries.

The Deceased was entitled, under his Father's Will, to Property producing an Income of 2,500*l.*, out of which an Allowance of 500*l.* a year was made to him, for his Maintenance and Support during his Minority. In 1828 his Guardians purchased for him a Commission in the Life Guards, the Pay of which amounted to 146*l.* per annum ; and they allowed him 800*l.* for Outfit.

Two Hosiers, *Ludlam* and *Hills*, claimed, under the Decree, to be Creditors of the Deceased for the Amount of their Bills for Shirts, Gloves, Stocks, Handkerchiefs and other Articles with which they had profusely supplied the Deceased, between November 1828 and June 1829*. The *Master* allowed about half the Amount of each Bill. The Deceased's Widow then presented a Petition contending that the *Master* ought to have disallowed the whole Amount of the Bills, and praying that it might be referred back to the *Master* to review his Report.

Where an Infant has an Allowance made to him, by his Guardians, for his support, a Tradesman is not entitled to be paid for Articles supplied to the Infant, on credit, unless he can make out that, having regard to the Infant's Circumstances and Station (which he is bound to inquire into), the Articles were Necessaries.

Sir *E. Sugden* and Mr. *Wakefield* for the Petitioner :

It lies on the Tradesman who supplies an Infant with Goods, to show that they are Necessaries. The Articles which these Tradesmen supplied, were not Necessaries. They had nothing to do with the Infant's Outfit as an Offi-

* Two hundred and nine pairs of Gloves, besides Ladies' Gloves, were charged for in *Hills'* Bill.

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v.
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cer. A Tradesman cannot recover even for Necessaries, if another Tradesman has supplied the Infant with the same Articles, although he may be ignorant of that fact. Here the Articles charged for were furnished by the two Tradesmen concurrently. *Ford v. Fothergill* (a), *Bainbridge v. Pickering* (b), *Maddox v. Miller* (c), *Cook v. Deaton* (d), *Berolles v. Ramsay* (e).

Mr. Knight and Mr. K. Parker, for *Ludlam*, said that this Case was different from any that had been decided: that it was not the Case of an Infant living in his Father's House; but of a Young Man placed out in the World, holding a Commission in the Army, and who was left by his Trustees and Guardians in the situation of a Man having the spending of his own Income.

Mr. Stinton for *Hills*.

The VICE-CHANCELLOR :

I take it to be the Law, that it is the duty of those who trust Infants for Goods supplied to them, to make themselves acquainted with their Circumstances, in order that they may determine whether the Articles supplied really are Necessaries or not. In this Case, the Trustees, in 1827, had allowed the Infant 500*l.* a year, and, in 1828, they purchased for him a Commission in the Life Guards, and furnished him with 800*l.* for Outfit. The Question then is whether a Tradesman would be at liberty to furnish an Infant with Necessaries on Credit, when he might have known, if

(a) 7 Peake's N.P.C. 301.
S. C. Esp. N. P. C. 211.
(b) 2 Judge Black. 1325.

(c) 1 M. & S. 738.
(d) 3 Carr. & Payne, 114.
(e) Holt's Rep. 77.

he had made Inquiry, that the Infant was supplied with an Income for his own Support. I cannot think that a Tradesman would be at liberty to supply an Infant so circumstanced, on Credit.

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HALL.

With respect to *Hills's* Bill, it is nothing but sheer extravagance and folly. It appears that, between December 1828 and June 1829, he supplied this Young Man with 209 Pairs of Gloves, besides Ladies' Gloves, and with many other Articles which it is impossible that a Life Guardsman could want. And my opinion is that no Jury would be justified in giving him one farthing for that Bill.

With respect to *Ludlam*, he states, in his Affidavit, that he observed to *Nisbett*, that he could not supply him with the Articles he wanted, on Credit, by reason of his Minority; and that *Nisbett* replied that he was going into the Life Guards and required the Articles for his Outfit, and that he would pay for them out of the Money which was to be allowed him for that Purpose. When that Answer was given to *Ludlam*, it was his duty to make further Inquiry, and he then would have learnt what Sums were allowed to this Young Man for his Support and also for his Outfit; and, on those Facts being stated to him, he would not have been at liberty to supply this Young Man with all these Articles as Necessaries.

The Law with respect to Infants, was made for their Protection; and I am of opinion that a Tradesman who sues for Payment of a Bill for Articles supplied to an Infant, is bound to make out that, having regard to

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the Situation of the Infant, those Articles were Necessaries.

On what I now see with regard to these Bills, I am of opinion that they ought not to be allowed.

1834:
15th February.

*Pleading.
Cross-Bill.
Discovery.*

LOWNDES v. DAVIES.

THOMAS JAMES SELBY devised his Real Estates in *Buckinghamshire*, to his Heir-at-Law, for the finding out of whom he directed Advertisements to be published immediately after his Death; but, if no Heir should be found, he devised the Estates to *William Lowndes*, subject to his Debts, Legacies, &c.

A. being in possession of an Estate under a Decree in 1783, *B.* filed a Bill against him to recover the Estate, and brought a Writ of Right for the same purpose; *A.* then filed a Cross Bill against *B.*, seeking for a Discovery of Matters relating to *B.*'s Pedigree, and praying that *B.* might elect whether he would proceed at Law or in Equity, and that, if he elected the former, that he might be perpetually restrained from proceeding at Law to recover the Estate. *B.* demurred, because the Bill sought a Discovery of Matters constituting his Case at Law, and because the Order for putting him to his Election ought to be obtained on Motion, and not at the Hearing. Demurrer over-ruled.

The Testator died on the 7th of December 1772. After his death Advertisements were published pursuant to the direction in his Will, and several Persons claimed to be his Heirs. On the 28th of October 1773, *William Lowndes* filed his Bill against those Claimants, praying that the Will might be established, and that Issues might be directed, between himself and the Claimants, to try who was the Testator's Heir, and, if it should be found that the Testator left no Heir, then that he might be declared entitled to the Estates. The Cause was

Comm. of Surv. & flav. 1587. 304

heard on the 23d of April 1779, when it was ordered that the Claimants should be at liberty to bring an Ejectment to recover Possession of the Premises. The Action was tried on the 22d of April 1780, when a Verdict was found for *W. Lowndes*, the Defendant in the Action. On the hearing of the Cause for further Directions, on the 28th of March 1783, the Will was established and the Trusts were ordered to be performed, and it was declared that the Estates were to be considered as belonging to *W. Lowndes*, and that he should be let into Possession thereof, and that the Title-Deeds should be delivered to him.

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Lowndes, accordingly, entered into Possession of the Estates and remained in Possession till his death. In Trinity Term 1784, he levied a Fine *sur conuzance de droit come ceo* &c. of the Estates, with Proclamations, the last of which was made prior to June 1785, and thereby, the Bill alleged, he became seized, in his Demesne as of Fee, of the Estates. *William Lowndes* died on the 3d of May 1813, leaving *William Selby Lowndes* his eldest Son and Heir, who, thereupon, entered into and had ever since continued in Possession of the Estates.

On the 6th of December 1832, *T. Davies* and *Elizabeth* his Wife, in her right, issued a Writ of Right against *W. S. Lowndes*, to try their Right to the Estates, and, on the same day, they filed a Bill against him, stating the Will, the Proceedings in the former Suit, that neither they nor any Ancestor through whom *Elizabeth Davies* claimed, were Parties to that Suit, and that they had lately discovered, upon Investigation of *Elizabeth Davies's* Pedigree, that she was the Tes-

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tator's Heir: and the Bill prayed that it might be declared that *E. Davies*, as such Heir, was entitled to the Estates, and that *W. S. Lowndes* might deliver up Possession thereof to her, and account to her for the Rents; or that an Issue might be directed to try whether she was the Testator's Heir, or that, notwithstanding the Decree in the former Suit, she might be at liberty to proceed, at Law, to recover Possession of the Estates.

The Count delivered by *Davies* and Wife in the Writ of Right, alleged that *Erasmus Lloyd* was the Testator's Heir at his death. It then traced *Erasmus Lloyd's* Pedigree, and averred that, on his death, the Right to the Estates descended to *John Lloyd* his Son and Heir, from whom it descended to *Catherine, Frances* and *Mary*, his three Daughters and Co-heirs, and, from them, to *Elizabeth Davies*, who was the Daughter of *Catherine*.

The Bill in this Cause, which was filed on the 10th of June 1833 by *William Selby Lowndes* against *Davies* and Wife, after stating as above, alledged that, if the Allegations in the Count were true, *Davies* and Wife had no Right to the Estates, inasmuch as it was too late for them to claim any Interest under the Will, as they were barred by Length of Time and by the Fine and Nonclaim. The Bill then contained Charges as to *Erasmus Lloyd* and his deceased Descendants having been within the Realm and under no Disability, and as to the Periods of their Deaths, in order to show that they were not exempted from the operation of the Statute of Limitations or of the Fine and Nonclaim; and, for the same purpose, it required the Defendants to set forth the Times of the Births and Deaths, and the

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Places of Residence of *Erasmus Lloyd* and his deceased Descendants, and other Particulars relating to them, and when *Elizabeth Davies* was born, and when she and her Husband were married, and where they had, from time to time, resided ; and also to set forth a Schedule of all Deeds, Pedigrees and other Documents in their Possession relating to the Matters aforesaid : and it prayed that the Defendants might be ordered to elect whether they would proceed in their Suit in Equity or at Law, and, if they should elect to do the former, or, if the Court should be of opinion that the Merits of the Case required it, that they might be perpetually restrained from proceeding in their Action at Law and from, in any manner, disturbing the Plaintiff in the Possession of the Estates.

The Defendants answered those parts of the Bill which preceded the Allegation as to the Delivery of the Count in the Writ of Right ; but they demurred to the Discovery sought by the rest of the Bill, and also to so much of the Bill as sought that they might be ordered to elect whether they would proceed at Law or in Equity, and to all the Relief *consequent upon such Election*, the Plaintiff, on his own showing, not being entitled to such Order or Relief.

Mr. *Pepys*, Mr. Serjeant *Stephen* and Mr. *Spence*, in support of the Demurrer, said that the Answer gave all the Discovery that was necessary for obtaining the Equitable Relief sought by the Bill, namely, the Perpetual Injunction : that the rest of the Discovery was sought, not with a view to the Equitable Relief, but to the Plaintiff's Defence to the Writ of Right, and either was immaterial, or related to the Defendants' Pedigree and

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other Particulars of their Case, which they must prove at the Trial of the Writ of Right: that an Order for a Plaintiff to elect whether he would proceed at Law or in Equity, was never prayed for by the Bill and was not a subject of Relief, but ought to be obtained, by Motion, on the putting in of the Answer to the original Bill; and, consequently, that, though the Plaintiff might, on his Equitable Case, be entitled to the Perpetual Injunction, he could not be entitled to it *as consequential* to the Election irregularly prayed by the Cross Bill.

Sir *E. Sugden*, Mr. *Knight* and Mr. *Parry* appeared in support of the Bill :

But The VICE-CHANCELLOR without hearing them said :

I confess that this is the first instance I have ever seen of a Bill filed under such circumstances, or of a Bill asking that a Plaintiff in Equity might be put to his Election whether he would proceed at Law or in Equity. But, having regard to the Case which is stated, I think that it was very judicious, in Mr. *Lowndes*, to file this Bill, because it enables him to extort, from Mr. and Mrs. *Davies*, an Answer as to every Fact which can be brought forward by them to sustain their Case at Law, it being admitted that the Case by which they are to succeed at Law, is the identical Case by which they are to succeed in Equity. And, if a Person will file a Bill, he is, of course, exposed to the ordeal which the Defendant may subject him to by filing a Cross Bill; and he is then bound to set forth an Answer to all the matter which concerns his Title; for the truth of the matter

which concerns his Title, is material to the Defendant's Defence in Equity.

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With respect to those Allegations which relate to certain matters regarding the Plaintiff's Title, I think that the Defendant has a right to file a Cross Bill to know whether they are true or false: and, though it may seem to be immaterial to ask whether the Count had been delivered, it is a question that leads to that which is material, namely, the truth or falsehood of the Averments in the Count.

With respect to the Objection that Mr. *Lowndes* has prayed that Mr. and Mrs. *Davies* may elect whether they will proceed at Law or in Equity; although it is usual to obtain an Order for that purpose, on Motion, yet, in this Case, Mr. *Lowndes* appears to have a manifest advantage in allowing the Original Suit to go on to a hearing, and then to put the Plaintiffs in that Suit to their Election. And I am of opinion that this Relief which the Plaintiff in this Suit seeks, is a Relief which he is *primâ facie* entitled to have, and therefore that the Demurrer must be over-ruled.

DESANGES v. GREGORY.

1836:
6th February
Practice.
New Orders.

EXCEPTIONS taken to the Answer, for Impertinence, had been allowed by the *Master*. The Defendant excepted to the Report, and those Exceptions were allowed. The *Master*, on being applied to, declined to tax the Costs of the Reference, on the ground that,

Where a report of Scandal or Impertinence has been ex-

cepted to, the *Master* cannot tax the Costs of the Reference, under the 22d Order of 1833, without further Order. 12. Jan. 464.

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as the Report had been excepted to, he had no Authority, under the 22d Order of 1833, to tax the Costs of the Reference without further Order.

Mr. Toller, for the Defendant, now moved that the Master might be ordered to tax the Costs.

The Vice-Chancellor agreed with the Master, and made the Order.

1836:
6th & 8th
February.

Practice.
New Orders.
Injunction.

Under the 10th Order of 1833, the Common Injunction cannot be obtained on an Amended Bill until Five Weeks after Appearance, and, if the Defendant is then in default, the Application must be made according to the old Practice.

Tulacha v. Vincent
14 Beau. 214.

LEE v. RAVENSCROFT.

IN this Cause, the Common Injunction had been obtained; and, on the coming in of the Answer, it was dissolved, no Cause having been shown. The Plaintiff then amended his Bill; and the Defendant not having put in either a Plea, Answer or Demurrer within Eight Days after Appearance, a Motion, on Notice, was now made for an Injunction, on the Amended Bill, the Amendments being verified by Affidavit.

Mr. Knight and Mr. Mylne, for the Plaintiff, referred to *James v. Downes* (a), and *Home v. Watson* (b).

Mr. Jacob and Mr. K. Parker, for the Defendant, said that the Defendant was not in Default, as the Five Weeks allowed by the 10th Order of 1833 (this being a Town Cause) for the Defendant to answer the Amended Bill, had not expired: that the Five Weeks were substituted for the Eight Days allowed, by the same Order, to

answer the Original Bill: that an Injunction on an Amended Bill, could not be obtained, *as of course*, and, therefore, that part of the Order which entitles a Plaintiff to an Injunction in case the Defendant do not plead, answer or demur within Eight Days after Appearance, could not apply to an Amended Bill.

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LEE
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Mr. *Knight*, in reply, said that the Five Weeks were substituted for the Eight Weeks allowed to answer an Original Bill: that neither the Eight Weeks, nor the Five Weeks, were intended to apply to an Injunction Cause: that it would be monstrous to hold that a Plaintiff must wait Five Weeks before he could apply for an Injunction: that the words, "as of course," meant on complying with those Conditions which are required by the old Practice as laid down in the Cases cited.

The *Vice-Chancellor* said that the 11th Order pointed out the particular Recital to be inserted in the Order for an Injunction on an Original Bill; and that it seemed to him that the Injunction to which the 10th Order referred, was also an Injunction to be obtained on an Original Bill; but that he would consult The *Lord Chancellor* on the question.

The *Vice-Chancellor* said that he had conferred with 8th February. The *Lord Chancellor*, and that His Lordship was of opinion that the 10th Order applied only to Injunctions to be obtained on Original Bills; and that a Plaintiff, before he could obtain an Injunction on an Amended Bill, must wait till the Five Weeks had expired, and then, if the Defendant was in Default, he might move for the Injunction according to the old Practice.

Brooker v. Runtton
L.C. Sept. 11. 1841
re-opening this case
1 Cr. & Ph. 233.

IN THE MATTER OF BARKER.

1834:
14th July and
29th August.

*Solicitor and
Client.*

If a Solicitor retains Money received by him in his character of Solicitor for the use of his Client, his Bill is taxable, though it contains no Charges for Business done in a Court of Law or Equity.

Items in a Solicitor's Bill for preparing and settling a Bill in Equity, will render the Solicitor's Bill taxable, though the Bill in Equity was never filed.
Seemle.

IN 1828 *J. W. Ryle* and certain other Persons jointly employed *Henry Barker* of *Manchester*, Attorney-at-Law and a Solicitor of the Court of Chancery, to act as their Solicitor in obtaining for them Payment of certain Legacies to which they were entitled under a Will; and, at the same time, it was fully understood that his Bill of Costs was to be paid by them jointly. The Legatees, afterwards, authorized *Barker* to file a Bill in Equity, against the Executors of the Testator, to compel them to account for the Testator's Estate. *Barker*, accordingly, caused a Bill to be prepared and signed and settled by Counsel; but, in consequence of the death of one of the Executors, the Bill was never filed. The Claims of the Legatees were, afterwards, referred to Arbitration, and 1,427 *l.* 13 *s.* was awarded them. That sum was received by *Barker*, and he paid over 635 *l.* 5 *s.* 6 *d.* to the Legatees, and retained the remainder in his own hands. The Legatees continued to employ *Barker* as their Attorney and Solicitor, in the investigation of the Title and preparing the Conveyances of Estates bought by them from the Trustees of the Testator's Will.

In January 1833 *Barker*, after repeated Applications had been made to him, delivered certain Bills of Costs against all the Legatees jointly, and, in May following, he delivered a separate Bill against *J. W. Ryle* alone, in which were contained the Charges relating to the preparing, settling and signing the Bill in Equity. The Legatees, on a Petition stating that those Charges

ought to have been charged against them jointly, and not against *J. W. Ryle* alone, obtained the usual Order for taxing the Bills of Costs.

1834.

In re
BARKER.

Barker having applied to stay the Proceedings under the Order, and that the Petition might be again set down to be heard :

Mr. Knight and *Mr. Spence*, for the Legatees :

The Bills contain Charges for preparing a Bill in Chancery ; and the Rule is that, where a Solicitor has done Business which is referrible, purely, to his character of Solicitor, though no Suit has been instituted, the Court exercises Jurisdiction over his Bills and directs them to be taxed. *Luxmore v. Lethbridge* (a) ; *Sandom v. Bourn* (b) ; *Weld v. Crawford* (c). Where an Attorney or Solicitor withholds his Client's Documents or Money, the Courts exercise a Summary Jurisdiction over him. *Ex parte Aitkin* (d) ; The Earl of *Uxbridge's* Case (e) ; *Murray's* Case (f).

Sir Edward Sugden and *Mr. Duckworth*, for *Barker*, said that the Bills contained Charges for Business done towards a Suit ; but that, as the Bill in Equity was not filed, no Business had been done in a Court of Equity, and, consequently, the Bills were not taxable under 2 Geo. 2, c. 23. *Sandom v. Bourn* and *Weld v. Crawford* were overruled by *Burton v. Chatterton* (g).

(a) 5 Barn. & Ald. 898.

(b) 4 Campb. N. P. C. 68.

(c) 2 Stark. N. P. C. 538.

(d) 4 Barn. & Ald. 47.

(e) 6 Ves. 425.

(f) 1 Russ. 519.

(g) 3 Barn. & Ald. 486.

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The discussion in *Wardle v. Nicholson* (h), as to whether there was any proceeding in the Replevin, would have been idle if the Court had any general jurisdiction to direct the Bills to be taxed. There the Bonds were executed; but the Court thought itself bound to see whether any Proceeding had been had in a Suit. That Case and *Burton v. Chatterton* are conclusive that Charges for Acts done towards a Suit, do not make the Bill taxable. If the Court could have taxed the Bills by force of its general Jurisdiction, the Act of Parliament would have been useless. *Cocks v. Harman* (i), and *In the Matter of Lowe* (k), show that the general Jurisdiction of the Court does not exist. *Wilson v. Gutteridge* (l) was over-ruled by *Dagley v. Kentish* (m).

THE VICE-CHANCELLOR:*

In this Case it appears, upon Affidavits not contradicted, that Mr. *Barker* was employed, by the Petitioners jointly, to prepare a Bill in Equity; and he has delivered a separate Bill against one of them, in which are various items relating to the instructions for the Bill and the drawing of it. That Bill of Costs should have been made out against all the Petitioners, and ought to be considered as a Bill against them. A Bill was drawn and settled and signed by Counsel, but never filed. But, in pursuance of an Arbitration, 1,427*l.* 13*s.* was paid to Mr. *Barker* as the Solicitor or Attorney for the Petitioners. Out of that Sum he has paid them

(h) 4 Barn. & Adol. 469.

(l) 3 Barn. & Cress. 157.

(i) 6 East, 404.

(m) 2 Barn. & Adol. 411.

(k) 8 East, 237.

* His Honor delivered his Judgment in writing, after the Court had risen for the Long Vacation.

only 636*l.* 5*s.* 6*d.* After that, *Barker* did other Business for some of the Petitioners, and has delivered Bills of Costs; and, upon Petition, the Common Order for Taxation has been obtained: and I am asked, upon Motion, to stay Proceedings on the Order, because there was no taxable item in the Bills; and because, without such an item, it is said the Court has no general Jurisdiction to direct a Taxation.

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In re
BARKER.

It does not appear to me necessary to decide the latter point. There is, certainly, very strong authority to show that the Court has a general Jurisdiction in a Case not within the 2 G. 2, c. 23, s. 23. The Case of *Dagley v. Kentish* (*n*) has, I admit, thrown a doubt over the reason assigned for the decision in *Wilson v. Guttridge* (*o*). But, supposing the reason to be wrong, still the Decision may be right; as, in that Case, one of the Charges was for drawing a Warrant of Attorney: See *Sandom v. Bourn* (*p*) and *Weld v. Crawford* (*q*), in both of which Cases an item for drawing a Warrant of Attorney, was held to make the Bill taxable. In *Cocks v. Harman* (*r*) it did not appear that the Documents had been delivered to *Harman* in his character of Attorney: and it seems that the Decision in the Matter of *Lowe* (*s*) was wrong, because the Lease was put into *Lowe's* hands in his character of Attorney, and therefore, according to The Earl of *Uxbridge's* Case (*t*) and *Murray's* Case (*u*), the Court had Jurisdiction. It seems to me that, if the item of drawing a Warrant of

(*n*) 2 Barn. & Adol. 411.

(*o*) 3 Barn. & Cress. 157.

(*p*) 4 Campb. N. P. C. 68.

(*q*) 2 Stark. N. P. C. 538.

(*r*) 6 East, 404.

(*s*) 8 East, 237.

(*t*) 6 Ves. jun. 425.

(*u*) 1 Russ. 519.

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In re
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Attorney, makes the Bill taxable, although no Judgment is entered up in pursuance of it, the item of drawing a Bill in Equity, will, also, make the Bill taxable, though the Bill be not filed. In both Cases the preliminary step is taken to proceeding at Law or in Equity. Therefore, on that ground, I think *Barker's* Bills are taxable, or at least one of them. I take it to be settled Law, notwithstanding *Lowe's Case*, that, if the Attorney has his Client's Deeds in his hands, the Court will tax his Bill; and I see no substantial distinction between having the Client's Deed and having the Client's Money: for the Deed is of no other value than the subject to which it relates. Therefore, without the authority of *Ex parte Aitkin* (x), I should have thought the Bills taxable. But *Ex parte Aitkin* is an express Authority that the Court will tax the Attorney's Bill, who, in his character of Attorney, has possession of his Client's Money, though he has not possession of his Client's Deeds. Therefore, the Motion must be refused and with Costs; for I do not see upon what fair ground the taxation of the Bills should be opposed.

(x) 4 Barn. & Ald. 47.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

STANSBURY v. ARKWRIGHT.

1834 :
15th February.

*Pleading.
Outstanding
Terms.*

THE Bill (which was filed in January 1834) stated that *Thomas Stansbury*, being, in his lifetime and at his death, seised of the Lands after mentioned, by his Will dated the 12th of February 1767, devised his Lands in the Parish of *Leominster*, to his Wife for life, and, after her decease, to his Brother, *Samuel* and the Heirs of his body: that the Testator died in January 1771, and, his Wife having died in his life-time, *Samuel Stansbury*, upon the Testator's death, took possession of and became seised of the devised Premises, as Tenant in Tail under the Will, and continued to be so seised until his decease: that *Samuel Stansbury* died in or about 1793, leaving *Joseph Stansbury*, the Plaintiff's late Grandfather, his eldest Son and Heir in Tail, and who then resided in *America*; and, upon *Samuel Stansbury*'s death, some Person claiming or pretending to claim under his Will, took possession of the Premises; and that *Joseph Stansbury*, who continued to reside in *America* until his death, never took possession of the Premises: that he died in 1809, leaving *Samuel Stansbury* his eldest Son and Heir in Tail, and

Demurrer allowed to a Bill to prevent the setting up of Outstanding Terms, as it alleged, merely, that the Defendant threatened to set up some Outstanding Term. Such a Bill ought to state that there are such Terms and what is the nature of them.

9 K. 375

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who also then resided in *America* and continued to reside there until his decease: that he died in 1822, leaving the Plaintiff his eldest Son and Heir in Tail and who also then resided in *America* and continued to reside there until December 1824, when he arrived in this country, and had been since naturalized by Act of Parliament: that the Plaintiff, on his arrival, found the Defendant in possession of the Premises and that he claimed to be entitled thereto under some Title derived from some Person claiming under certain Indentures of Lease and Release executed by the Plaintiff's Grandfather; but that the Entail created by the Will, had never been barred or discontinued: that the Plaintiff being seised of or entitled to the Premises, as Heir in Tail under the Will, he, soon after his arrival in this country, brought an Ejectment against the Tenant in possession of the Premises, but, by reason of the absence of material Witnesses to prove his Pedigree and from other causes, he was unable to bring his Action to Trial until the then last Spring Assises for *Herefordshire*: that, at the Trial, the Plaintiff made out his Pedigree as Heir in Tail of *Samuel Stansbury*, the Testator's Brother, but, by reason of the lapse of time since the Testator's death, he was unable to prove the Seisin of the Testator and his Brother, and he was nonsuited, although the Defendant knew or had reason to believe, and, in fact, did believe that the Testator was, at the making of his Will and at his decease, seised of the Premises, and that *Samuel Stansbury* was and continued in the Seisin and Possession of the Premises, as first Tenant in Tail thereof under the Will, until his decease; but that the Defendant refused to admit the same, although, at the time he purchased the Premises, he took and still held some indemnity against the

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Claims of the Plaintiff or of the Party entitled under the Entail: that the Plaintiff had lately commenced another Ejectment against the Tenant in possession under the Defendant: that the Defendant threatened to set up some Outstanding satisfied Terms of Years, or other legal Estate or Interest in the Premises, in bar to the Plaintiff's right to recover possession of the said Premises in his then pending action of Ejectment: that the defendant had, in his custody, Deeds, &c. relating to the Matters aforesaid, and particularly to the Seisin of the Testator and his Brother; and that the Plaintiff could not safely proceed to Trial without a discovery of such Matters. The Bill prayed for a discovery, and that the Defendant might be restrained from setting up any Outstanding satisfied Term or other legal Estate, in bar to the then pending Action.

The Defendant put in a general Demurrer.

Sir *E. Sugden* Mr. *Knight* and Mr. *Wigram*, in support of the Demurrer:

An Order restraining a party from setting up Outstanding Terms in bar to an Ejectment, is relief which can only be had at the hearing of the Cause. *Hylton v. Morgan* (a); *Aston v. Lord Exeter*; (b) *Northey v. Pearce* (c); *Barney v. Luckett* (d). A Plaintiff, therefore, who seeks such relief, must state, upon his Bill, a case upon which, if admitted by the Answer or proved at the hearing, the Court could make a Decree. A mere sur-

(a) 6 Ves. 293.

(b) Ibid. 288.

(c) 1 Sim. & Stu. 420.

(d) Ibid. 419.

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ARKWRIGHT.

mise that the Defendant intends to set up Outstanding Terms, not alleging that there are any such, or suggesting any reason why the Defendant is unable to state the facts relating to those Terms, is insufficient. *Jones v. Jones* (e); *Barber v. Hunter* (f); *Frietas v. Dos Santos* (g). If a Bill to restrain the setting up of Outstanding Terms is properly framed, the Defendant may plead that there are no such Terms. *Armitage v. Wadsworth* (h). In this Case such a Plea would not be *ad idem*; for the Bill does not allege there are any Outstanding Terms, but only that the Plaintiff *threatens to set up some Outstanding Terms*. Consequently, the Plea must be that the Defendant does not threaten or intend to set up any Outstanding Term; which would be absurd.

If the Plaintiff is not entitled to the relief prayed by his Bill, he is not entitled to the Discovery.*

Mr. *Pepys* and Mr. *Ching* for the Bill :

The allegation that the Plaintiff threatens to set up Outstanding Terms, implies that they exist, and the Defendant, by demurring to the Bill, has admitted that he does threaten to set them up. In *Jones v. Jones*, there was no statement from which it could be inferred that there were any Outstanding Terms. The Bill merely prayed that the Defendant might be restrained from setting up any Outstanding Term.

(e) 3 Mer. 161.

(g) 1 Youn. & Jer. 574.

(f) Ibid. 170, cited.

(h) 1 Madd. 189.

* The Defendant's Counsel also contended that the Plaintiff was an Alien, and that his right to file the Bill was barred by length of time. See *Cholmondeley v. Clinton*. 1 Turn. & Russ. 107.

The VICE-CHANCELLOR :

The Bill does not allege that there is any Outstanding Term or Estate ; but, merely, that the Defendant threatens to set up some Outstanding Term or other Legal Estate. Moreover a Plaintiff who seeks to restrain a Defendant from setting up an Outstanding Term or Estate, ought to state, in his Bill, what sort of a Term or Estate it is. For an Outstanding Term or Legal Estate may be such as to make it impossible for the Plaintiff to recover in Ejectment. If, for instance, in this Case the Legal Fee was not vested in the Testator when he made his Will, the Plaintiff, on his own showing, could not recover in Ejectment.

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Demurrer allowed.

1834 :
17th February.

PORTER v. FOX.

Will.
Construction.
Remoteness.

WILLIAM PORTER, by his Will dated the 3d of April 1807, gave to Trustees, whom he also appointed, the surplus of his Personal Estate and the Rents of his Real Estate to be invested in Stock, and the Dividends to be accumulated, and to be and remain Assets for improvement, in the hands of his Executors, until the time and times should arrive when distribution should be made, as thereby directed. The Testator then directed his Real Estates to be sold after the decease of the survivor of his Wife and Son and the Proceeds to be invested in Stock, and the Dividends to be accumulated, to be and remain Assets for improvement in the hands of his Executors, for the benefit of his Grandchildren and his Nephew T. O. and to be distributed as they should become of the age of 25 years. The Testator had Two Grandchildren born in his lifetime, both of whom died infants, one in his lifetime and the other after his death. Another Grandchild was born after the Testator's death who was an Infant when the Bill was filed. T. O. survived the Testator and attained 25. Held that the Bequest was void for Remoteness.

Peard v. Feklewick 15 Beau. 178. 3
Chapman v. Bradley 4 De. & L. 75

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pointed his Executors, all his Real and Personal Estate, upon Trust to secure, support and maintain the several Contingencies therein mentioned or referred to, with full power to Lease all the said Estates and to take the Rents and Profits thereof to maintain the several contingent Expenditures thereby bequeathed and appointed, and the Surplus thereof to be disposed of in the manner thereby directed, *and to be and remain Assets, in their hands, for improvement until the time and times should arrive when distribution should be made as thereby directed*: and he gave to his Wife, *Elizabeth Porter*, for her life, an Annuity of 160 *l.* to be paid out of his Real and Personal Estates, and, after the decease of his Widow, he gave to his Son, *William Porter*, for his life, an Annuity of 80 *l.*: and he directed that, after payment of the Annuities, at the expiration of every year or as soon as convenient, such Surplus as should happen to arise, annually, from time to time, out of his Real and Personal Estate, should, annually, during the lives of his Widow and Son, be placed out, by his Executors and Trustees, in the Funds, and the Dividends, together with all the preceding Dividends that were due and Rents that might be collected up to the end of the year, should, annually, be laid out, by his Executors, in some such Capital Stocks in some or one of the Public Funds, to be and remain Assets, for improvement, in the hands of his Executors and Trustees for the benefit of such surviving Child or Children as aftermentioned.

And the Testator ordered that, at the decease of his Widow, all his Household Furniture, Beds, Bedding, Plate, Linen, China and all other Furniture and Implements of housekeeping, should be sold, and the Money arising from such sale to be placed out as aforesaid, to be and

remain Assets for improvement as aforesaid ; and, at the decease of the longest liver of his Widow and Son, or as soon as conveniently might be afterwards, he directed his Trustees and Executors to sell all his Real Estate, and, with the Money arising therefrom, to purchase more Stock as aforesaid, as far as it would go, to be and remain Assets for improvement in the hands of his Executors and Trustees *for the benefit of his Grandchildren and his Nephew, Thomas Owen, and to be distributed in manner and form following, that is to say, as they should become of the age of 25 years respectively* : and he directed that his Trustees should, as soon as any one of his said Grandchildren and Nephew should arrive at the age of 25 years, transfer so much of the Capital Stock, so purchased as therein directed, as should amount to an equal Part or Share according to the number of such Children as should be then living ; and, as soon as the next surviving Child should arrive at the age of 25 years, then he directed his Executors and Trustees to transfer another equal Share of such Capital Stock then remaining, including the improvements, as should amount to an equal Share according to the number of the then surviving Children that should not before have had his or her preceding Portion, and so on to the last ; and, as soon as the last should arrive at the age of 25 years, he or she should have transferred to him or her the rest and residue of the whole Capital Stock so remaining, with all Interest or Dividends due thereon and all Profits and Accumulations whatsoever thereunto belonging since the last transfer : but, in case the last Survivor should die before he or she should arrive at the age of 25 years, if he or she should have a Child or Children, or leave one or more lawfully begotten *in ventre sa mere* and born alive, such Child or Children should be entitled to his,

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her or their Father's or Mother's Residue, and the Father and Mother of such Child or Children, or his or her lawful Representative, should take the Dividends or Interest of such Residue towards his, her or their maintenance and bringing up to maturity or age of 21 years; but, for want of such succession in Issue at the expiration of one year after the decease of the last-mentioned Legatee, such Residue should go among the other Legatees or their lawful Representatives, to be equally divided among them share and share alike.

The Testator died on the 8th of April 1807, leaving *Elizabeth Porter* his Widow, and *William Porter* his only Child and Heir at Law him surviving. *William Porter* the Son had two Children born in the Testator's lifetime, both of whom died infants and unmarried, one of them in the Testator's lifetime, and the other, shortly after his death. The Plaintiff, who was the Daughter of *William Porter* the Son, was the only other Grandchild of the Testator. She was born in August 1808. *Thomas Owen* was an illegitimate Son of the Testator's Sister: he was born in 1788, and died, intestate, in 1818. The Testator's Widow died intestate in 1814. The Plaintiff's Father and Mother also died intestate, the former in 1819, and the latter in 1828; and the Plaintiff obtained Letters of Administration to them and to the Testator's Widow.

The Plaintiff, by the original Bill, which was filed during her infancy, against her Mother, (who was then alive) and the Executors of the Testator, claimed the whole of the Testator's Real and Personal Estate and the accumulated Rents of his Real Estate, as the Heir and sole Next of Kin of her Father and the Testator,

subject to such Claims as her Mother might have thereon.

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She afterwards filed a Supplemental Bill against The *Attorney-General*, stating that he alleged that, as *Thomas Owen* was a Bastard and lived to attain 25 and afterwards died Intestate, all his Interest in the Testator's Real and Personal Estate had become vested in the Crown.

The Cause now came on to be heard for further directions.

Mr. *Pepys* and Mr. *Spence*, for the Plaintiff, contended that the Trust declared, by the Will, of the Produce of the Testator's Real and Personal Estate, was Void for Remoteness, according to *Leake v. Robinson*. (a)

The *Attorney-General* and Mr. *Wray* for The Crown:

In the Will, there is a direct Gift of the Property to the Grandchildren; therefore, those only who were living at the Testator's death, were intended to take.

[The *Vice-Chancellor*:—The distribution is part of the Gift; and the distribution is to be amongst *all* the Grandchildren.]

If all the Grandchildren are to be let in, the Will does not postpone the vesting of their Shares until they attain 25; but their Shares are vested, subject to be divested on their dying under 25. There is, first, a Gift of the Property for the benefit of the Testator's Grandchildren

(a) 2 Mer. 363.

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and his Nephew *Thomas Owen*, and then the time of distribution follows, in a separate sentence. If the Grandchildren do not attain 25, their Shares are divested.

Should the Court be against us on these Points, we submit that, at all events, *Thomas Owen* was entitled to a Share. We do not question the doctrine laid down in *Leake v. Robinson*. There, no Person was named. The Persons intended to take were a Class, constituting one Devisee.

Here the Grandchildren are the Class, *inter se*. *Owen* is not a Member of the Class. The Clauses of Distribution and Survivorship affect the Grandchildren only: *Owen's* name is not mentioned in them. If he had been intended to be one of the Class, his name would have been mentioned in those Clauses. The Testator clearly intended *Thomas Owen* to take; and, if he had been named by himself, he, clearly would have taken. Therefore, the difficulty in *Leake v. Robinson* does not occur in this Case. Does it follow, because he is named with Persons whose Legacies are void for remoteness, that he is not to take? Notwithstanding the Legacies to the Grandchildren are void, the number of the Grandchildren ought to be ascertained, in order to fix the Share which *Owen* is to take.

Sir *E. Sugden* and Mr. *Lynch* appeared for the other Defendants.

THE VICE-CHANCELLOR :

As it is the wish of the Parties that I should give my Opinion on this Will, I must hold that the Trust for the

benefit of the Testator's Nephew and Grandchildren is, altogether, void.

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The Testator, after giving Annuities to his Wife and Son, directs the Surplus Income of his Real and Personal Estate to be invested annually in the Funds, and the Dividends to be laid out, in like manner, to be and remain Assets for Improvement in the hands of his Executors and Trustees, for the benefit of such surviving Child or Children as after-mentioned. That is the first sentence in which he alludes to the Persons who are ultimately to take; and he alludes to them as a Class, without mentioning any Child or Children of his Sister or of his Son. Then he directs his Trustees and Executors, at the decease of his Wife, to sell his Household Furniture, Beds, &c., and the Money arising therefrom to be placed out as aforesaid, to be and remain Assets for Improvement as aforesaid; and, at the decease of the Survivor of his Widow and Son, to sell his Real Estates, and, with the Money arising therefrom, to purchase more Stock as aforesaid, to be and remain Assets for Improvement in the hands of his Executors and Trustees, for the benefit of his Grandchildren and his Nephew, *Thomas Owen*. There, it is true, he names one individual, and describes others as if they constituted a Class; but he speaks of the same Persons as he had previously referred to as a Class. Then he says: "And to be distributed in manner and form following, that is to say, as they shall become of the age of 25 years respectively: And I do hereby order and direct that my said Trustees shall, as soon as any one of them my said Grandchildren and Nephew shall arrive at the age of 25 years, transfer so much of the Capital Stock, so pur-

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chased as herein directed, as shall amount to an equal Part or Share according to the number of such Children as shall be then living." He there uses the word *Children* as comprehending the Children of his Son and also the Child of his Sister. And then he directs his Executors and Trustees, as soon as the next surviving *Child* should attain 25, to transfer another equal Share of the Capital Stock, according to the number of the then surviving *Children*, and so on to the last; and, as soon as the last should attain 25, that he or she should have transferred to him or her, the Residue of the Capital Stock. He then supposes that the last Child might not attain the age of 25 years, and he directs that, in that case, the Share of that Child shall go to his or her Children; and, if that Child should have no Issue, then he gives it to the other Legatees, alluding to them as a Class. What the Testator meant was that the Right of each Child should depend on there being a Class formed, and that the first Members of that Class who attained 25, should take a Share, the amount of which should be determined by the number of individuals then constituting the Class. The Testator has directed such a distribution to take place, amongst a Class of Persons, as the Law will not allow. If the whole of his intention cannot prevail, effect cannot be given to any part of it. It would be inconsistent with that intention to allow *Thomas Owen* to take a Third Share of the Fund; for the Testator meant each Person's Share to be determined by the number of the Class, consisting of his Grandchildren and *Thomas Owen*, who should be living when the first attained 25.

There are several passages in the Judgment in *Leake*

v. Robinson, which exactly apply, in spirit, to this Will.

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Declare that the Plaintiff is entitled to the whole Fund.*

* An Appeal from this Decree, on behalf of the Crown, was heard before Lord *Lyndhurst* C.: His Lordship directed a Case to be made for the Opinion of the Court of Common Pleas upon the Will. But, before the Case was argued, the Suit was compromised.

WHITTINGTON *v.* JENNINGS.

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18th February.

IN 1808 certain Mine-Shares were assigned to Trustees, in trust for *Samuel Tice* for life, and, after his decease, for his Wife for life, and, after the decease of the Survivor, in trust to raise 760 *l.* and pay the same to such Persons as *Samuel Tice* should, by Deed or Will, appoint, and, in default of appointment, to his Executors. Mrs. *Tice* died in 1809. In 1811 *Samuel Tice* conveyed his Life Interest in the Mine-Shares and in certain other Property, to Trustees in trust to apply one Moiety in payment of the Sums due from him to the Persons mentioned in the Schedule to the Deed, and to apply the other Moiety for his own maintenance and support.

*Debtor and
Creditor.
Voluntary Deed.*

A. made a Voluntary Assignment of a Sum of Money, being, at the time, indebted to *B.* on Balance of a running Account. *A.* afterwards made Payments to *B.*, exceeding in Amount the Balance due at the Date of the Assignment; but the Balance continually increased. The Assignment was set aside at the Suit of *B.*

The Plaintiff was an Innkeeper; and, in 1812, he entered into an agreement with *Tice* to provide him with Board and Lodging for 200 *l.* a year; and *Tice* continued to board and lodge in the Plaintiff's house, from

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that time until his death. In 1814 *Tice*, being indebted to the Plaintiff in 68 *l.*, executed a Warrant of Attorney for securing that Sum. In 1816 *Tice*, who then owed the Plaintiff 107 *l.*, made a voluntary Appointment of the 760 *l.* (of which the Plaintiff was wholly ignorant until after *Tice's* death) in favour of the Defendants. From time to time Payments greatly exceeding, in the whole, the Sum due at the date of the Appointment, were made by *Tice* to the Plaintiff, and Settlements of Account took place between them, on every one of which an increased Balance appeared to be due to the Plaintiff, and *Tice* gave him Bonds for those Balances. In 1823, the Plaintiff, at *Tice's* request, paid to the Trustees of the Deed of 1811, the Sum of 150 *l.*, being the Balance due to them in respect of their Receipts and Payments under that Deed; and, thereupon, the Trustees assigned the Trust-property to the Plaintiff in trust for *Tice*. In December 1830 *Tice* died, having, by his Will, appointed the Plaintiff his Executor. At *Tice's* death a balance of 536 *l.* was due from him to the Plaintiff.

The Defendants having claimed to have the 760 *l.* raised and paid to them, the Bill was filed praying that the Appointment might be declared to be fraudulent and void as against the Plaintiff and *Tice's* other Creditors (if any); and that the same might be delivered up to be cancelled, and that the Plaintiff might be declared to be entitled to the 760 *l.* as part of *Tice's* Assets.

Sir *E. Sugden* and Mr. *Teed*, for the Plaintiff, said that, at the time when the Appointment was made, *Tice* was in involved circumstances; that he was then in-

debted to the Plaintiff, and that the Debt continued to exist and increase from that time until his death, and, consequently, the Appointment was void under 13 Eliz. c. 5.

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Mr. *Knight* and Mr. *Williams* for the Defendants :

A Creditor who seeks to defeat a Voluntary Deed, must show either that the Grantor was indebted to the extent of Insolvency at the time when he executed the Deed, or that, at that time, he was indebted to the Creditor, and that the Debt remains unpaid. *Lush v. Wilkinson* (a); *Kidney v. Coussmaker* (b). In this case there is no proof either of Insolvency or of continuing Debt. It appears, by the Exhibits, that 150 l. was due from the Testator to the Plaintiff in December 1817, and that, in the course of next Year, he made Payments to the Plaintiff amounting to 220 l.; therefore the original Debt was destroyed. *Devaynes v. Noble* (c). On every Settlement of Accounts, the Bond given for the preceding Balance, was delivered up and cancelled.

Sir *E. Sugden* in reply :

The Debt due in 1816 went on continually increasing. Where there is an existing Obligation at the time when the Voluntary Deed is executed, a subsequent Debt on that Obligation will entitle the Creditor to be relieved against the Deed. *Richardson v. Smallwood* (d). The Deed of 1811 shows that, at that time, the Testator was unable to meet his Engagements, or, in other words, that he was Insolvent. So that, in this case, there was both a continuing Debt and a continuing Insolvency.

(a) 5 Ves. 384.

(b) 12 Ves. 136.

(c) 1 Mer. 585.

(d) Jacob. 552.

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The VICE-CHANCELLOR :

In *Devaynes v. Noble* there was, first of all, a Partnership of Five Persons ; and then, Mr. *Devaynes* having died, there was a Partnership of Four. A Party who had dealt with the Partnership of Five, continued to have dealings with the Partnership of Four, in the course of which they made Payments to him : and the question was whether, as there was a Balance due to him at *Devaynes's* death, he was to be considered as a Creditor of the Five in respect of that Balance, or whether the Payments made to him by the Four, ought to be applied in reduction of that Balance. But that case has no application to this. For, here, the Creditor always dealt with the same Person : and, though some money was, from time to time, paid in respect of the old Debt, that Debt went on continually increasing.

The Testator was Insolvent from 1811 ; and no Solvency was acquired by the Transaction of 1823 ; or subsequently. There was only a substitution of a Creditor in lieu of the Trustees ; and, at the very moment when that substitution was made, the old Debt was increased. It would be an improper application of the principle of *Devaynes v. Noble* to apply it to a case like the present.

Declare that the Plaintiff is entitled to the 760 *l.* as part of the Testator's Assets.

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*Tenant for Life.
Waste.*

BY the Settlement on the Marriage of Mr. and Mrs. *Long Wellesley*, dated in 1812, the Capital Mansion-house called *Wanstead House*, and the Buildings, Gardens, Orchards and Park thereto belonging were, together with other Hereditaments, conveyed to the use that Lady *C. T. Long* might receive, thereout, a Yearly Rent-charge of 4,600 *l.* for her life, with remainder to Trustees for 100 Years, without Impeachment of Waste, upon the Trusts thereafter expressed, and, subject thereto, to the use of Mr. *Long Wellesley* for life, without Impeachment of Waste, with remainder to Trustees to preserve &c. with remainder to Mrs. *Long Wellesley* for life, without Impeachment of Waste, with remainder to Trustees to preserve &c. with remainder to certain other Trustees, for 1,000 Years, without Impeachment of Waste, in Trust to raise Portions for Younger Children, with remainder to the First and other Sons of the Marriage, successively, in Tail Male: And the Tenants for Life, when in possession of the Estates, and the Trustees, during the minority of any Child entitled to an Estate of Freehold and Inheritance therein, were empowered to grant Leases, for 99 Years, of any parts of the Estates, to any Person who would improve or covenant to improve the same by erecting thereon any House or Houses, Erections or Buildings, or to rebuild or repair any of the Messuages, Tenements, Erections or Buildings which then were, or, at any time thereafter, should be on the Estates, or to expend such Sums in Improvements thereof as should be thought adequate for the interests therein respectively to be parted with.

A Mansion-house, Park, and Pleasure Grounds with certain Villas on the Estate, were limited in strict Settlement; and the Trustees were empowered to grant Building Leases of the settled Estates, and, at the request of the Tenant for Life, to pull down the Mansion-house, sell the Materials and apply the proceeds in paying off Incumbrances on the Estates. The House was, accordingly, pulled down, but the Tenant for Life unimpeachable of Waste, was afterwards restrained from felling the ornamental Timber in the Park and Grounds.

*Morris v Morris
15 Am 505*

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And the Trustees were also empowered to sell or exchange any part of the settled Premises, and to apply the Money in payment of the Charges and Incumbrances therein mentioned, and, subject thereto, to invest such Monies in other Lands to be settled to the same uses ; and, also, at the request of Mr. and Mrs. *Long Wellesley* or the Survivor of them, to be signified as therein mentioned, to cause *Wanstead House* to be pulled down, or any other of the Mansion-houses, Capital and other Messuages and other Buildings which then were, or should be standing upon any part of the Estates, without rebuilding the same, and to sell the Materials thereof ; and it was declared that the Trustees should stand possessed of the Money to arise therefrom, upon the Trusts thereby declared of the Money to arise from the sale of any part of the settled Estates that might be sold under the Power thereinbefore contained.

When the Settlement was executed the Manor of *Wanstead* comprised, amongst other things, the Park, Pleasure Grounds and Gardens of *Wanstead*, together with the Mansion-house, and also several ornamental Villas near the Park ; and the Park, Pleasure Grounds and Gardens contained a great number of Trees which had been planted or were left standing for the ornament or shelter of the Mansion-house, Park and Pleasure Grounds, in Clumps, Lines, Avenues or Vistas, or in single Trees: and the Lands adjoining to and forming the Approaches to the Mansion-house, Park and Pleasure Grounds also contained a great number of Trees which had been planted or left standing for the ornament or shelter of the Mansion-house, Park and Pleasure Grounds, and also of the Villas contiguous thereto.

In pursuance of the Power in the Settlement, the Trustees caused *Wanstead House* to be pulled down, and sold the Materials.

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Mrs. *Long Wellesley* died in 1825, leaving the Defendant her Husband, and the Plaintiff, her eldest Son, her surviving.

The Bill, which was filed in 1828, alleged and the Answer admitted that the Defendant had lately caused to be felled a great number of the Trees in the Park, Gardens and Pleasure Grounds of *Wanstead*, which were planted for the ornament thereof, and also divers other Trees planted in Avenues, Vistas and Clumps, and separately or singly, both in the Park and upon the Lands adjoining thereto, for the ornament and shelter of the Park and Pleasure Grounds; and that he had also marked for cutting down nearly 2,000 other Trees which were standing and growing in and about the Park and Pleasure Grounds and the Lands adjoining thereto, the whole of which were either standing in the Park and Pleasure Grounds, and were ornamental thereto, or were planted in Vistas, Avenues and Clumps, or separately and singly upon the Lands and Grounds adjoining the Park and Pleasure Grounds, and were intended for the ornament and shelter thereof. The Bill further alleged that a large proportion of the Trees marked for cutting down, consisted of Limes, Horse Chesnut, Sycamore and other Trees not fit to be felled for Timber, and that, by the felling thereof, the whole of the Demesne of *Wanstead Park* would be laid waste, and become wholly incapable, for a very long period of years, of being applied to the purposes of a Residence, either by the Persons who, under the Settlement, might thereafter

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become entitled in Possession to the Inheritance of the Domain, or by those to whom such Persons might demise the same, and that the Lands and the Messuages erected thereon, would be greatly injured or lessened in value. The Bill prayed that the Defendant might be restrained from cutting down any Timber or other Trees then standing in and upon the Park, Garden and Pleasure Grounds, and which were planted or growing there for the protection or shelter of the Park, Garden and Pleasure Grounds, or for the ornament thereof, and from felling or cutting down any Timber or other Trees which were planted and stood or grew in Avenues, Vistas or Clumps, or separately or singly, for the ornament of the Park, Gardens and Pleasure Grounds, or other Grounds and Lands thereto belonging.

The *Vice-Chancellor* granted the Injunction, *ex parte*: and, in 1830, a Motion to dissolve it on the coming in of the Answer, was refused, by Lord *Lyndhurst*. The Cause now came on to be heard.

Sir *E. Sugden*, Mr. *Pepys* and Mr. *Cockerell*, for the Plaintiff:

This Case was argued at great length, on the Motion to dissolve the Injunction. That Motion was refused; and no alteration has since taken place in the circumstances of the Case. The whole of the Property is of an ornamental nature: and, though the Mansion-house has been pulled down under a power in the Settlement, yet that Settlement did not anticipate that, therefore, the Grounds were to be destroyed. There are several Villas belonging to the Property, which will lose their value if the Timber is cut down. The Plaintiff is within a few months of being of Age; and, when he comes into Pos-

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session, he may think fit to have the Mansion-house re-built.

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Mr. *Beames* and Mr. *R. Roupell* for the Defendant :

The Settlement, so far from contemplating the continuance and preservation of the Mansion-house, contained a Clause, under which the Trustees, with the sanction of Mr. and Mrs. *Wellesley*, were empowered to pull it down, sell the Materials and apply the Proceeds in paying off the Incumbrances on the Estates. Accordingly, the Mansion-house has been pulled down ; and the Money produced by the sale of the Materials, has been applied in a manner very beneficial to the Persons in Remainder, namely, in paying off the Incumbrances on the settled Estates ; but Mr. *Wellesley*, the Tenant for Life, has been deprived of the benefit he might have derived, either by letting the House or using it as a Residence. It appears, by his Answer, that he was about to exercise, merely, his legal right, by cutting such Timber as was fit to be cut.

Lord *Lyndhurst* gave no Reasons for his Judgment ; but, just before his retirement from Office, simply, refused the Motion. It by no means follows that an Injunction ought to be made perpetual, merely because it has been continued until the Hearing.

This Court has never restrained a Tenant for Life unimpeachable of Waste, from exercising his legal right, except where there has been a Mansion-house. *Williams v. Day* (a) ; Lord *Bernard's* Case (b) ; *Abraham v. Bubb* (c) ; *Packington's* Case (d) ; *Charlton's*

(a) 2 Ch. Ca. 32.

(c) 2 Freem. 53.

(b) Prec. Ch. 454.

(d) 3 Atk. 215.

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Case (e). There is no Case in which, the Mansion-house having been pulled down under a Provision in the Settlement, this Court has protected the Timber which would have been ornamental to it if it had remained. The Timber is connected with the House, and the House being gone, the Protection of this Court has ceased.

[The *Vice-Chancellor* :—The Timber need not, necessarily, be ornamental to the House ; for this Court protects Trees even if they are out of sight of the House.]

The Court, certainly, does protect Trees planted at a distance from the House, provided they were planted or left standing with reference to the House. The Marquis of *Downshire v. Sandys* (f) ; Lord *Tamworth v. Lord Ferrers* (g) ; *O'Brien v. O'Brien* (h) ; *Chamberlayne v. Dummer* (i) ; *Day v. Merry* (k) ; *Leighton v. Leighton* (l) ; *Strathmore v. Bowes* (m).

Lord *Eldon* always lamented the existence of the Jurisdiction of this Court in Cases of equitable Waste, and, uniformly, refused to extend it. In the Marquis of *Downshire v. Sandys*, His Lordship says : “ There is no instance of arguing that the Injunction is to be granted upon that ground, that the Trees are ornamental, not to the Estate upon which they grow, but to the surrounding Country.”

[The *Vice-Chancellor* :—Lord *Eldon* there alludes to the Lands of other Persons.]

(e) 1 Vez. 265, cited.

(f) 6 Ves. 107.

(g) Ibid. 419.

(h) Amb. 107.

(i) 1 Bro. C. C. 165.

(k) 16 Ves. 375.

(l) 1 Bro. C. C. 168, note.

(m) 2 Bro. C. C. 88.

Here the Court is asked to exercise its Jurisdiction with reference to the Villas which are on the outside of the Park.

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Burges v. Lamb (n), *Smythe v. Smythe* (o), and *Coffin v. Coffin* (p), also are Cases which show Lord *Eldon's* reluctance to extend the Doctrine of this Court as to Equitable Waste. Here the interference of the Court is sought to protect Timber which was ornamental to a Mansion-house that no longer exists; which is extending the doctrine much further than it has been carried in any Case that has been hitherto decided.

The VICE-CHANCELLOR:

The whole of the Case was before Lord *Lyndhurst*, on the application that was made to him, on the coming in of the Answer, to dissolve the Injunction which I had granted *ex parte*. No Evidence has been gone into; and, therefore, the circumstances of the Case, as they appeared on the Bill and Answer, remain unaltered. The consequence is that I am bound by what Lord *Lyndhurst* has done.

An Account must be taken of the Timber felled and of the Monies received, by Mr. *Wellesley*, from the sale of it. The Amount must be paid into Court, and form part of the Settlement Fund, but he is not to take a Life-interest in it; and the Injunction must be made perpetual.

(n) 16 Ves. 174.

(o) 2 Swans. 251.

(p) Jac. 70.

1834:
19th & 21st
February.

GARRETT v. NOBLE.

*Executors and
Trustees.*

Executors who were directed by the Will to call in the Testator's Personal Estate with all convenient speed, continued his Trade for some years after his death, and ultimately a considerable Loss was sustained. But the Court refused to charge them with the Loss, as they had acted *bona fide*, and according to the best of their judgment.

Acquiescence.

If a Person interested under a Will, files a Bill for an Account, against the Executors, not seeking to charge them for wilful default, and dies pending the Suit, his Personal Representative cannot charge them by Bill of Revivor and Supplement, if the acts complained of, were known to the deceased Plaintiff.

WILLIAM DEVAYNES, by his Will dated the 15th of June 1808, gave all his Real and Leasehold Estates, and all his Money, Securities for Money, Capital in Trade, Debts, and all other his Personal Estate and Effects, to *William Noble, Samuel Pepys Cockerell* and *Frederick Booth*, and their Heirs, Executors, &c. in Trust, with all convenient speed after his decease, to call in and convert into Money all his Personal Estate, and, at such times as they should think proper, absolutely to sell and dispose of his Freehold and Leasehold Estates, either altogether or in Parcels, by Public Auction or Private Contract, to such Persons and for such Prices as they should think fit; and to stand possessed of the Proceeds, upon Trust, after payment of his Debts, Legacies and Annuities, for his Son *William Devaynes* and his Children: and he empowered his Trustees to Lease his Real Estates until the Sale thereof, and appointed them his Executors. By a Codicil dated the 17th of June 1808, the Testator revoked the Trusts declared by his Will as to his Real and Personal Estates, and declared that his Real Estates should be held by his Trustees in Trust for his Son *William Devaynes* for life, when he should attain the age of 27 years, and, after his decease, in Trust for his Children as therein mentioned. The Testator then

gave to his Trustees Powers, in the usual form, for Leasing and Selling and Exchanging his Real Estates with the consent of the Person for the time being entitled to the Rents: and, as to his Leasehold and Personal Estate, he declared that the same should be converted into Money according to the directions in his Will, and that, out of the Proceeds, his Trustees should pay his Debts, Legacies, &c., and invest the Surplus in the manner directed by his Will, and stand possessed of the Securities upon Trusts corresponding, as nearly as might be, with the Trusts before declared of his Real Estates.

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The Testator died in November, 1809. At his death he was a Partner in the Banking-house of *Devaynes, Noble & Co.*: and he also carried on the Business of a Paper-maker at certain Freehold, Leasehold, and Copyhold Mills at Iping in Sussex. The Testator was seised and possessed of Four-Tenths of the Mills and of the Capital, Stock in Trade and Effects belonging thereto, and had agreed, with *T. Harrison* and the Assignees of *Henry Cooke*, his late Partners in the Business, for the purchase of the remaining Shares. The Accounts of this Partnership had not been settled since April 1803, and were in a very confused state. In December 1809, the Executors determined to put an end to the Business of the Mills as soon as practicable, and to sell the Mills and the Stock in Trade and Effects belonging thereto; and, accordingly, they applied to *Harrison* and to *Cooke's* Assignees to concur in the proposed Sale, but the latter refused. In April 1810, at which time there was a considerable Stock in the Mills and several Orders undertaken by the Testator which remained unexecuted, the Executors, by the advice of the Person who had been confidentially employed by the Testator to manage the Mills

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for him, determined, with a view to eventually selling the Mills to the greatest advantage, to continue the working of them, in order that the Trade and Connections and Machinery might be preserved. Accordingly, the Mills were worked, and the Business was carried on in the same manner as in the Testator's lifetime, and the Executors continued their endeavours to sell them and the Stock and Effects belonging thereto, and to prevail on *Harrison* and *Cooke's* Assignees to concur in the Sale. In May 1810 *Harrison* became Bankrupt. In July following, the surviving Partners in the Bank became Bankrupts. In September 1810 *William Devaynes*, the Son, attained 27, and, thereupon, the Trustees and Executors let him into possession of all the Testator's Real Estates except the Mills. In Michaelmas Term 1810 *W. Devaynes* and *Louisa* his Wife filed a Bill against the Executors and Trustees and certain other Persons, stating (amongst other things) that he had been let into possession of *all* the Real Estates, and praying for the usual Accounts, but not complaining of any Breach of Trust or other misconduct on the part of the Trustees and Executors.* On the 12th of March 1811 the Solicitor for *Devaynes* and Wife, by *Devaynes's* desire, wrote a letter to *Booth*, inquiring how the Iping Account stood, whether the Debts had been collected, and whether there was a probability of the Concern being brought to a close shortly. *Booth* wrote, in answer, that the Executors had been very anxious to put an end to the Concern ever since the death of *Devaynes* the elder, but that disputes about the Title had prevented it. In Easter Term 1811 the Executors were under the necessity of filing a

* See *Devaynes v. Noble*, 1 Mer. 529.

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Bill, against the Assignees of *Cooke* and *Harrison*, to compel a specific performance of the Agreements entered into with the Testator, and to have the Accounts of the Partnership between him and the Bankrupts taken from the 30th of April 1803, and for an Injunction to restrain an Action which *Cooke's* Assignees had brought against the Executors, for the recovery of a large Sum of Money. On the 2d of March 1812, the Causes of *Devaynes v. Noble* and *Baring v. Noble* (the latter being a Suit by Creditors of *Devaynes, Noble & Co.*) were heard. *Cooke* having proposed to purchase the Mills and the Stock and Machinery thereon, an Order in the three Causes of *Noble v. Cooke*, *Devaynes v. Noble*, and *Baring v. Noble*, was made, in March 1813, on the application of the Executors, with Notice to all Parties and *Devaynes and Wife appearing by their Counsel*, by which, after reciting that the Business of the Mills had been carried on, since the death of the Testator, by his Executors, but the Accounts of the Testator's Estate having been directed, by the Decree in the two last-mentioned Suits, to be taken before the *Master*, *the Executors did not feel themselves warranted in carrying on the Business of the Mills, especially as it had become unproductive, and, if continued, would require a considerable Sum for that purpose*; it was referred to the *Master* to inquire and state whether the Proposal ought to be carried into execution, or whether it was proper that the Mills, Stock in Trade and Effects should be sold in any other manner. On the 5th of July 1814, the *Master* reported that it would be proper that the Mills, Stock and Effects should be sold to *Cooke* upon the Terms proposed. The Solicitor for *Devaynes and Wife* attended the Proceedings before the *Master* under the

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Order, and took a Copy of the Report. In November 1814, and before the Sale could be completed, *Cooke* again became Bankrupt; and thereupon the Executors discontinued the working of the Mills, except for the purpose of working up the Materials then on the Premises, and discharged the Workmen. In December 1814 a Decree was made, according to the Prayer of the Bill, in *Noble v. Cooke*. In April 1815 the Executors obtained an Order, as before, that the Mills and Utensils should be sold by Auction, and that the Executors should have a reserved Bidding on the Sale. Accordingly the Mills were put up to Sale on the 17th of July 1815, in two Lots; but no Person bid for the first Lot, and there was one Bidding only for the second, which was greatly below its value, and, in consequence, the Mills were not sold. On the 7th of November 1815 the Executors obtained an Order, as before, referring it to the *Master* to inquire what it would be proper to do with respect to the Mills. On the 17th of February 1816, the *Master* reported that the Mills ought to be advertised for Sale by Private Contract; and the Solicitor for *Devaynes* and Wife attended before the *Master* as before. The Mills were frequently advertised, but no offer was made for them.

In January 1818, *Devaynes*, the Son, died, leaving his Wife and two Infant Children surviving. In Hilary Term of that year, a Bill of Revivor and Supplement was filed by Mrs. *Devaynes* and her Children, stating (amongst other things) the Will of *Devaynes* the Son, and that his Widow had obtained Letters of Administration with his Will annexed, and praying that the Suits might be revived and prosecuted, and that proper Directions might be given for Payment, to Mrs. *Devaynes*,

of the Jointure appointed to her, under a Power contained in the Will of *Devaynes* the Father, out of his Real and Personal Estate. In November 1818, the Decree was made in the Supplemental Suit, directing the Decree in *Devaynes v. Noble* and *Baring v. Noble*, and the Proceedings therein, and the Accounts and Inquiries thereby directed, to be carried on and prosecuted between the then present Parties in like manner as thereby directed as to the Parties to the said original Causes. On the 17th of June 1820, the Mills were again put up to Auction, under an Order made on Notice to all Parties; but no sufficient Bidding was made for them. Under another Order made, in like manner, in 1821, the Mills were, and had been ever since, let on Lease, with the approval of the *Master*.

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Mrs. *Devaynes* afterwards married *Robert Garrett*, and thereupon the Suits were revived. In 1823 *Noble*, who had been the Active Trustee of the Will of *Devaynes* the elder, died: and, in 1824, Mr. and Mrs. *Garrett* and the Infants filed a Bill of Revivor and Supplement against his Executor, praying, amongst other things, for an Account of his Estate possessed by his Executor. In June 1826 the Decree was made in the last-mentioned Suit. In 1827 *Cockerell* died, having appointed his Wife and his two Sons his Executors.

In February 1828 Mr. and Mrs. *Garrett* and the Infants filed a Bill of Revivor and Supplement against the Executors of *Noble* and *Cockerell*, and against *Booth* and other Parties, stating that *Devaynes* the elder had, at his death, a large Capital invested in his Business of a Paper-maker; that, according to the directions in his Will and Codicil, the Implements, Machinery,

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Utensils, Capital and Stock in Trade of the Business ought to have been sold immediately after his death, and the Proceeds invested for the Benefit of *Devaynes* the younger, his Wife and Children ; that the Plaintiffs had, lately and long since the filing of the first Supplemental Bill, discovered that the Executors took upon themselves to carry on the Business with the Monies which they received on account of the Capital thereof and the other Personal Estate of their Testator, and thereby his Estate had sustained a Loss of 70,000*l.* and upwards. The Bill prayed that the Suits might be revived against *Cockerell's* Executors, and that it might be declared that it was a Breach of Trust in the Executors to continue the Business of the Mills, and that *Booth*, and the Estates of *Noble* and *Cockerell* might be charged with the Loss sustained thereby.

The Defendants, in their Answer, said that the Business was carried on *from necessity, and with the knowledge and acquiescence of Mr. and Mrs. Devaynes and their Solicitor*, and that a great Loss would have accrued to the Testator's Estate, if the Business had been stopped upon the Testator's death.

The *Attorney-General*, Mr. *Knight* and Mr. *Spence*, for the Plaintiffs :

The Will and Codicil contain no direction for carrying on the Business ; on the contrary, they direct the Personal Estate to be called in, and converted into Money with all convenient speed after the Testator's death. If Trustees continue a Trade when they are not directed so to do—if they carry it on longer than is necessary to wind it up, they do it at their own hazard.

The original Suit was instituted so early as 1810, and the Decree in that Suit was made in 1812. The Executors might have applied, by Petition in that Suit, for the direction of the Court as to the course which they ought to take. It was not, however, until March 1813 that the question as to the propriety of selling the Mills, was brought under the consideration of the Court. Why was not the plan of Leasing the Mills resorted to before 1821?

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Devaynes, the younger, was Tenant for Life only under the Will and Codicil. No conduct of his could affect his Wife or his Children; and, consequently, any case of acquiescence that might have been made out against him, is now at an end. Mrs. *Garrett's* Title did not commence till after his death; and the Infants were not brought before the Court until 1818; and, therefore, they cannot be bound by any proceedings in the Suit which took place previously to that time.

[The *Vice-Chancellor* :—If there was acquiescence on the part of *Devaynes* the younger, and the Infants file a Bill in conjunction with his Personal Representative, the Court could not give them any relief. How is the Court to deal with a Suit in which, as to one of the Co-plaintiffs, it ought to dismiss the Bill, and, as to the other Co-plaintiffs, to give relief?]

The Court is bound to administer relief to Mrs. *Garrett* as Jointress under the Power in the Will of *Devaynes* the elder. She cannot, in that character, be bound by any acquiescence on the part of *Devaynes* the younger.

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Primâ facie, the conduct of the Trustees amounts to a Breach of Trust; but we do not ask the Court now to declare that a Breach of Trust has been committed, but we ask for an Inquiry only.

Sir *E. Sugden*, Mr. *Pepys*, Mr. *Rolfe*, Mr. *Purvis* and Mr. *J. Romilly*, for the Defendants :

The Infants were brought before the Court so early as 1818. In the Bill which was then filed, there is no complaint against the Executors. If a Suit is instituted on behalf of Infants, they are as much bound by it as if they were Adults. If the Mother of the Infants cannot maintain this Suit, the Infants cannot maintain it. The original Bill was filed in 1810, by *Devaynes* the younger, who was deeply interested in his Father's Estate; and, since his death, the Parties have gone on filing Bills of Revivor and Supplement: ought they then to be allowed to file a new Bill stating Facts known to the Person under whom they Claim? If you file a Bill against Executors, and do not charge them for wilful Default, it is too late, after a lapse of 18 years, to file a new Bill against them for that purpose. It appears, from the Evidence, that the Executors were most anxious to do their duty, and that every exertion was made by them to dispose of the Mills. They had great difficulties to encounter, owing to the Bankruptcies of *Cooke & Harrison*, and to *Harrison's* death. If the Executors, when they found that they could not sell the Mills, had stopped the working of them, the Machinery and Trade would have been destroyed. They continued the Trade, as they were justified in doing, merely for the purpose of selling it beneficially; and they employed the same Person to manage it, as the

Testator had done, and in whom he had placed entire confidence. From the Letter of March 1811, the Order of March 1813, and the other Orders in the Cause and the Proceedings before the *Master* under them, Mr. *Devaynes*, under whom Mrs. *Garrett* claims, knew that the Trustees were carrying on the Trade and every thing that took place with respect to the Mills, and yet he never made any objection. When Mrs. *Garrett* filed the Bill of Revivor and Supplement in 1818, she did not complain of any misconduct in the Trustees; but she, thereby, adopted all the prior Proceedings in the Cause, as the Representative of her late Husband.

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The *Vice-Chancellor*, after stating the Will and Codicil, proceeded thus :

The Will does not make it imperative on the Trustees to proceed to Sale of all the Personal Property in the Mills, immediately after the death of *Devaynes* the Father; but directs the Trustees, *with all convenient speed after the death of the Testator*, to call in and convert into Money all his Personal Estate. By the Codicil, a Power to sell the Real Estates is given to the Trustees, with the consent of the Person for the time being entitled to the Rents. It is reasonable to suppose that there could not be an advantageous Sale of the Personal Property in the Mills, unaccompanied by a Sale of the Mills themselves. I think, therefore, that the Trustees might, reasonably, pause until a year after the Testator's death, when *Devaynes* the Son attained 27, before they proceeded to sell the Personal Property in the Mills. It appears, from all the Documents that have been read, that the Trustees had no other desire

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than to do the best they could in the complicated state of the Testator's affairs.

As *William Devaynes*, on attaining 27, was put in possession of all the Real Estates except the Mills, it must have occurred to him to inquire why he was not put in possession of the Mills. In the Bill which he filed in 1810, he made no complaint as to the Mills; and yet he must have been aware what was the condition of them and of the Trade connected with them. On the 12th of March 1811, his Solicitor wrote a Letter to Mr. *Booth*, containing inquiries as to the Mills; but no proceeding was taken in consequence of the answer which was sent to those inquiries. In Easter Term 1811, after the Trustees had exerted themselves, but without success, to prevail on the Assignees of *Cooke & Harrison* to concur in a Sale of the Mills, the Bill was filed in *Noble v. Cooke*, to compel a specific performance of the Agreement entered into, by *Harrison & Cooke's* Assignees, with the Testator. In March 1812, a Petition was presented by the Executors in the three Causes of *Noble v. Cooke*, *Devaynes v. Noble*, and *Baring v. Noble*; the institution of which last Suit, it may be observed, must have greatly augmented the embarrassments under which the Executors were labouring. That Petition stated (amongst other things) that the Business of the Mills had been carried on, since the death of the Testator, by his Executors; but that, the Accounts of his Estates being directed, by a Decree in the two last-mentioned Causes, to be taken before the *Master*, the Executors did not feel themselves warranted in carrying on the Concern, especially as it had become unproductive, and, if continued, would require

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a considerable Sum of Money for that purpose; and it prayed that it might be referred to the *Master* to inquire and state whether the Proposal, which *Cooke* had made, for the Purchase of the Mills and the Stock and Utensils therein, ought to be carried into execution. On the hearing of this Petition, *William Devaynes* and his Wife appeared by Counsel; and it was then referred to the *Master* to inquire and state whether the Proposal ought to be carried into execution. On the 5th of July 1814 the *Master* made his Report: and it appears on the face of the Report that *William Devaynes's* Solicitor attended the *Master* on the reference. In December 1814 the Decree was made in *Noble v. Cooke*. In April 1815, another Order for the Sale of the Mills was obtained in the three Causes, in consequence of *Cooke* having become Bankrupt.

[His *Honor* then detailed the other Proceedings in the Causes, which took place in the lifetime of *William Devaynes* the Son.] On the making of all these Orders, *Devaynes*, the Son, appeared by Counsel, and his Solicitor attended the Proceedings before the *Master* under them; but no complaint was ever made respecting the Mills. In January 1818 *Devaynes* the Son died; and, in Hilary Term of that year, his Widow, expressly in the character of his Administratrix, together with her Children, filed a Bill of Revivor and Supplement; but, in that Bill, no complaint of any Breach of Trust as to the Mills, was made against the Executors of *Devaynes* the elder. In November 1818, a Decree was made in the Supplemental Suit, which directed the Decree of March 1812 to be carried on and prosecuted; but no general Report has ever been made in pursuance of that Decree. In June 1823 *Noble*, who was the acting

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Trustee and Executor under the Will of *Devaynes* the elder, died; and *Cockerell*, another of the Trustees and Executors, has since died. In February 1828 the present Bill was filed by Mrs. *Devaynes*, now Mrs. *Garrett*, and her Husband and Children, which expressly adopts all the Proceedings in the Original Cause, and in the Revived and Supplemental Causes.

The Rule of Law is that, where Trustees *bonâ fide* exert themselves to discharge their Duty and merely commit an error in judgment, unless there is a plain violation of Trust, they shall not be visited severely. The fair exercise of their judgment is a protection to them, although the consequence may be bad. Here, in the first instance, there was a difficulty, and they set themselves to cope with it as well as they could: and not only was a fair judgment exercised by the Trustees, but their proceedings were watched by *Devaynes* and his Solicitor. If *Devaynes* made no complaint, and his Representative filed a Bill in 1818 and made no complaint, it is monstrous that in 1828, five years after the death of *Noble* who principally acted in the Trusts of the Will, she should file a Bill and say that every thing that has taken place is to go for nothing, and that the matter is to be treated as if it had been only recently discovered that the Trustees had acted wrongly. I think Mr. and Mrs. *Garrett* must be considered, from the very frame of the Bill, to have adopted the representative character and all the prior Proceedings in the Suits.

If this Bill had been filed immediately after the death of *Devaynes* the Son, it ought to have been dismissed, with Costs, so far as it seeks to charge the Executors with a Breach of Trust; and, therefore, the

proper Decree for me to make, is to direct the Decrees and Proceedings in the Original and Supplemental Causes to be carried on and prosecuted, and the Accounts and Inquiries thereby directed to be taken and made between the present Parties to these Suits, in like manner as thereby directed as to the then Parties; and to dismiss so much of the Bill as relates to the Breach of Trust charged therein against the Executors, with Costs.

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EATON v. SANXTER.

THE late Lord *Aylesford*, by his Will dated the 27th of March 1809, devised his Estates in *Suffolk, Cambridgeshire* and *Middlesex*, to the Marquis of *Bath* and his Heirs, in Trust to Sell, and directed that the Receipts of the Marquis, his Heirs, Executors or Administrators, for the Monies to arise from the Sale, should be good Discharges to the Purchasers, and that such Monies should be vested in the Marquis of *Bath*, Lord *Dartmouth* and the late Lord *Winchelsea*, upon the Trusts thereby declared; and he appointed his Son, the present Lord *Aylesford*, sole Executor of his Will.

On the 6th of November 1811 the Testator made a Codicil; and thereby, after reciting that he intended,

remaining incomplete at his death. Held that his Executor was the proper Party to give Receipts for the Purchase-monies of the Estates contracted to be sold by the Testator.

Notice to a Purchaser of Judgments against the Vendor whose Estate is limited to Uses to bar Dower, does not prevent the Purchaser from taking the Estate free from the Judgments, under an exercise of the Power reserved to the Vendor.

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16th and 17th
April.

Vendor and
Purchaser.
Judgments.

Testator devised his Estates to Trustees in Trust to sell, and declared their Receipts to be sufficient Discharges: and he directed his Trustees to complete any Contracts for the Sale of his Estates, entered into during his lifetime and re-

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forthwith, to proceed to sell the devised Estates, ratified and confirmed the Devise thereof, in his Will, to the Marquis of *Bath*, Lord *Winchelsea* and Lord *Dartmouth* and their Heirs, upon Trust to sell and dispose of the same or such Parts thereof as should remain unsold at his decease, in the manner directed by his Will, *and with the same Powers and Authorities as were thereby for that purpose given and provided: and, also, upon Trust to carry into Execution any Contract or Contracts for the Sale thereof entered into during his lifetime and remaining uncompleted at his death: and* he revoked the Trusts declared, by his Will, of the Monies to arise from the Sale of the Estates, and directed that the same should be applied in paying off certain Legacies and Incumbrances thereon, and that the Surplus should be laid out in the purchase of other Lands, to be settled to the Uses therein mentioned.

In August 1812, *Matthew Siggs* agreed with the Testator to purchase part of the devised Estates, and paid him a Deposit on the Purchase-money.

The Testator died on the 20th of October 1812. The Trustees accepted the Trusts of the Will and Codicil, and, by Indentures dated the 29th and 30th of September 1814, they, together with the present Lord *Aylesford* conveyed to *Siggs* the Premises which he had agreed to purchase as before-mentioned. Lord *Winchelsea* executed the Deeds by Attorney; but his Co-Trustees and Lord *Aylesford* executed them in Person, and signed the Receipt for the Purchase-money.

On the 11th of October 1814, *Siggs* made a Mortgage of the Premises for a Term of 500 years, which,

by an Indenture of the 21st of August 1821, was transferred to the Plaintiff.

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Siggs died in 1826, having devised the Premises to his Son, *Charles Thomas Siggs*, in Fee. In 1827 *C. T. Siggs* sold the Premises, subject to the Mortgage, to the Defendant, *Sanxter*; and the Premises were conveyed to *Sanxter* and his Trustee, to the usual Uses to bar Dower.

By the Decree on the hearing of this Cause, it was referred to the *Master* to take an Account of the Principal and Interest due on the Plaintiff's Mortgage and on the other Incumbrances in the Pleadings mentioned, and to state their Priorities; and, with the consent of all Parties to the Suit, the Premises were ordered to be sold with the approbation of the *Master*.

At the Sale, *Francis Dayrell*, Esq. purchased Lot 1.

The Purchaser took several Objections to the Title, one of which was because the Vendor was unable to produce the Power of Attorney under which the Conveyance to *Matthew Siggs* had been executed on behalf of Lord *Winchelsea*. In order to remove that objection, the Vendor obtained from Lord *Winchelsea's* Devisee, a Conveyance of the legal Fee in One-third of the Premises.

The other Objections not being removed, an Order was obtained referring it to the *Master* to inquire and state whether a good Title could be made to the Lot.

The Purchaser carried in the following Objections before the *Master* :

First : That, by reason of the Indentures of the 29th

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and 30th of September 1814 not having been executed by Lord *Winchelsea*, a good Discharge was not given for the Purchase-money by those Deeds. Secondly: That the Estate in contract was subject to numerous unsatisfied Judgments against the Defendant, *Sanxter*.

The *Master* held both the Objections valid, and reported against the Title: whereupon the Vendor excepted to the Report.

Mr. *Knight* and Mr. *Girdlestone*, Junior, for the Vendor :

First : The late Lord *Aylesford*, by entering into the Contract with *Matthew Siggs*, impressed the Property sold with the character of Personalty, and thereby relieved the Purchaser from the necessity of seeing to the application of his Purchase-money. Lord *Aylesford*'s Executor was the proper Party to give the Receipt for the balance of the Purchase-money, and he, in conjunction with two of the Trustees, did give the Receipt.

Secondly: The Mortgage-term, which is anterior to the Judgments, will be got in; and, the Estate being limited to Uses to bar Dower, the Judgments will be defeated by the exercise of the Power reserved to the Vendor. *Doe v. Jones* (a); *Tunstall v. Trappes* (b).

Sir *E. Sugden* and Mr. *Coote* for the Purchaser:

First: The completion of the Contract with *Siggs*, was, expressly, within the authority of the Trust created by the Codicil. Therefore, it made no difference whether the Testator or his Trustees sold. It was said that the

(a) 10 Barn. & Cress. 459. (b) Ante, Vol. 3, p. 300.

Testator had converted the Property into Personalty: but it was only a notional conversion in this Court. The three Trustees accepted the Trusts: consequently nothing but the personal Receipt of the Three, could discharge the Purchaser.

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[The *Vice-Chancellor*:—If Lord *Aylesford*, when he made the Contract, had received the whole of the Purchase-money and given a Receipt for it, a good Conveyance might then have been made by the Devises in Trust.]

Secondly: The Property purchased was sold under a Decree taken by consent in a Suit to which the Judgment Creditors are not Parties. The object of the Decree, was, simply, to provide for the Payment of those Incumbrancers who are Parties to the Suit. The *Master* has no authority to advertise for Creditors; nor can any Creditors, except those who are Parties to the Suit, be required to come in under or be bound by the Decree.

It was decided, in *Doe v. Jones*, that the execution of a Power defeats Judgments: but it is difficult to come to that conclusion; for it has been decided that, if a Party puts a fetter on his own Estate, he cannot defeat it by a subsequent Execution of his Power. Besides, the decision in *Doe v. Jones*, does not apply to a Case in which Judgments are obtained on Warrants of Attorney executed by the Party after he is in possession of the Estate; for such Judgments are not proceedings *in invitum*.

In this Case too, the Purchaser has Notice of the Judgments, by which his conscience is affected; and

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there is a prior Term of years, which will not be defeated by the Execution of the Power. Any Judgment Creditor may sue out Execution, and make good his Judgment against that Term; or he may redeem the Mortgage, and then tack his Judgment to it.

[The *Vice-Chancellor*.:—If the Judgment Creditor's Lien on the Reversion is defeated by the Execution of the Power, he will not be entitled to redeem the Term.]

Mr. *Knight* in reply.

THE VICE-CHANCELLOR :

The Provision in the Will as to the Receipts of the Trustees, is not applicable to a Case in which the Testator, in his lifetime, made the Contract for Sale and received part of the Purchase-money.

The Testator, by his Will, devises his Estates to The Marquis of *Bath* in Fee, in Trust to sell; and then he declares that the Receipts of The Marquis for the Monies to arise from the Sale, shall be effectual Discharges to the Purchasers. Then he makes a Codicil, by which he joins Two other Persons as Co-Trustees with The Marquis, and directs them to sell such parts of his Estates as should remain unsold at his decease, in the manner directed by his Will. That applies only to those parts of the Estates which were capable of being sold under the Will. By the Codicil, the Testator has made a Division of the Trust: he has directed his Trustees to sell such parts of his Estates as should remain unsold at his death, and to complete the Contracts for such parts as should have been contracted to be sold in his lifetime. Therefore, with respect to

the latter, the Sales would be left to be completed so far as the act of the Trustees was necessary. It was not competent to the Testator to impose fetters on the performance of the Contracts which he had entered into. When he had sold any part of his Estates, the Receipt Clause, from the very nature of the Case, became inapplicable. The Executor of the Testator then became the proper Party to give the Receipt for the Purchase-money; and, as the Executor joined in the Receipt to Mr. *Saxter*, he had that Discharge which he ought to have had.

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With respect to the Judgments, I think, as the Law now stands, that there is nothing to prevent the Vendor from proceeding, by an exercise of his Power, to vest the Fee-simple in the Purchaser. The Appointment carrying with it the Equity of Redemption of the Term, will enable the Purchaser to take the Estate free from the Judgments.

The consequence is that The *Master* is wrong, and the Exception must be allowed.

1834 :
17th April.

Deed.
Construction.
Bankrupt.

SNOWDON v. DALES.

A. assigned 800 l. to Trustees in Trust during the life of B. or such part thereof as they should think proper, or at such other Times and in such Portions as they should judge expedient, to pay the Interest to him, or, if they should think fit, to lay it out in procuring for him Diet and other Necessaries, but so that he should not have any right to the Interest other than the Trustees, in their uncontrolled discretion, should think proper, and so as no Creditor of his should have any Claim thereon, nor should the same be subject to his Debts, Disposition or Engagements : and it was declared that, after his death, the 800 l., and all Savings and Accumulations of Interest, if any, should be in Trust for his Children, and, if he should have no Child, then in Trust for C.

B. became Bankrupt. The Trustees had paid him the Interest down to his Bankruptcy. Held that his Life Interest passed to his Assignees.

BY a Deed-poll of the 7th of December 1821, after reciting two Indentures by which J. Crosby assigned two Mortgage-sums of 1,000 l. each, to Trustees upon such Trusts, &c. as he should appoint: It was witnessed, and Crosby did thereby appoint that the Trustees should stand possessed of those Sums, in Trust for himself for life, and, after his decease, in Trust to pay thereout 500 l. and 700 l. to his Wife's Daughters, *Susannah Hepworth* and *Anne Thompson*, respectively ; and, as to the remaining 800 l., in Trust, during the life of *John Doughty Hepworth*, his Wife's Son, or during such part thereof as the Trustees should think proper, and at their will and pleasure but not otherwise, or at such other Time or Times, and in such Sum or Sums, Portion and Portions as they should judge proper and expedient, to allow and pay the Interest of the 800 l. into the proper hands of the said J. Doughty Hepworth, or otherwise if they should think fit, in procuring for him Diet, Lodging, Wearing Apparel and other Necessaries ; but so that he should not have any Right, Title, Claim or Demand in or to such Interest, other than the Trustees should, in their or his absolute and uncontrolled power, discretion and inclination, think proper or expedient,

In re Cro's Trust. 4 May 1821.

and so as no Creditor of his should or might have any Lien or Claim thereon in any case, or the same be, in any way, subject or liable to his Debts, Disposition or Engagements ; and, in case he should marry and leave a Widow him surviving, then, after his decease, to pay the Interest to his Widow during her life, for her separate use, in such manner as the Trustees should judge proper : and Crosby thereby declared and appointed that a proportionate part of the Interest should be paid up to the day of the decease of J. D. Hepworth and his Widow ; and that, from and after the decease of him or his Widow, the 800 l. and all Savings or Accumulations of Interest, if any, should be in Trust for his Children in equal Shares, with benefit of Survivorship on any of them dying under 21 ; but, if he should have no Child who should attain 21, then one Moiety of the 800 l., and all Savings and Accumulations of Interest, if any, should be upon such Trusts, &c. as Anne Thompson should appoint, and, in default of appointment, in Trust for her absolutely ; and that the other Moiety should be in Trust for Susannah Hepworth absolutely : and the Trustees were empowered to apply the Interest and Capital of the Shares of J. D. Hepworth's Children, for their maintenance and advancement respectively.

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SNOWDON
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DALES.

Crosby died in October 1822. In April 1832 *J. D. Hepworth* became Bankrupt. The Trustees had paid or applied the Interest of the 800 l. to him or to his use, down to the time of his Bankruptcy.

The Bill which was filed, by the Assignees, against the Bankrupt and his Infant Children, and against the Trustees and *Anne Thompson* and *Susannah Hepworth*, prayed that the Plaintiffs might be declared to be entitled

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to the Bankrupt's Life-interest in the 800 *l.*, for the benefit of his Creditors, and that the Trustees might be decreed to pay, to the Plaintiffs, the Interest of the 800 *l.* become due since the Bankruptcy and to accrue due during the Bankrupt's life.

The Defendants put in a general Demurrer.

Mr. *O. Anderson*, in support of the Demurrer, said that, by the Deed, the Trustees had a discretion to determine the payment of the Interest of the 800 *l.*, at any time during *J. D. Hepworth's* lifetime, and to accumulate the Interest; and that the words: "all Savings and Accumulations of Interest, if any, shall be in Trust for all and every the Child or Children of the said *J. D. Hepworth*," amounted to a Gift over to the Children.

Mr. *Bethell*, in support of the Bill, said that the Trustees, as the Bill alleged, continued to pay the Interest to *J. D. Hepworth* down to the time of his Bankruptcy, and that then their discretion ceased: *Piercy v. Roberts* (a): that the Deed did not authorize the Trustees to withhold the payment of the Interest during any part of his life, and accumulate it; but directed them either to pay the Interest to him, or to lay it out in procuring Necessaries for him: that the words: "Savings and Accumulations," meant such Savings and Accumulations as might be made after the death of *Hepworth* and his Widow, and until his Children attained 21.

(a) 1 Myl. and Keen. 4.

The VICE-CHANCELLOR :

It is plain that the Grantor did intend to exclude the Assignees : and that object might have been effected if there had been a clear Gift over.

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But the question is whether there is any thing in the Deed that amounts to a direction that the Trustees shall withhold the payment of the Interest and accumulate it, during the lifetime of *J. D. Hepworth*, if they shall think fit. Although the words : " Savings and Accumulations," as they first occur, might bear that construction ; yet, taking the whole of the Instrument together, I think that the better construction is that those words do not enable the Trustees to withhold and accumulate any portion of the Interest during the life of *J. D. Hepworth*.

Declare that the Plaintiffs are entitled to the Bankrupt's Life-interest in the 800 *l*.

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1835 :
20th and 21st,
23d and 24th
November,
4th December.

1836 :
23d February.

Portions.
Satisfaction.
Evidence.

SIR JOHN BARRINGTON was Tenant for Life, with remainders to his first and other Sons in Tail-male, with remainder to his Brother *Fitzwilliam Barrington*, for life, with remainders to his first and other Sons in Tail-male, with remainder to himself in Fee, of an Estate, in the Isle of Wight, called the Swainston Estate. Sir *John* was a Bachelor; his Brother, *Fitzwilliam*, was Married, and had Issue Six

Testator being seized of a Reversion in Fee expectant on the death and failure of Issue Male of himself and his Brother, and being possessed of a Leasehold Estate and of Stock in the Funds, devised the Reversion to Trustees for the term of 1,000 years and gave to them the Leasehold Estate and Stock, in Trust to raise 10,000 *l.*, which he directed to be held in Trust for his Niece *Julia*, the Daughter of his Brother, for life, and, after her decease, in Trust for any Husband who might survive her, and, after the decease of the Survivor of them, in Trust for all the Children of his Niece who should be then living. The Niece married about three months after the date of the Will : and, by a Settlement made in contemplation of the Marriage, the Testator, in consideration of natural love &c. for his Niece *Julia*, the Daughter of his Brother, and for her advancement in life and to provide a maintenance for her, charged the Reversion with the payment (after the death of the Survivor of himself and his Brother without leaving Issue Male who should attain 21) of the Interest of 10,000 *l.* to his Niece's Husband for life, and after his decease, to his Niece for life, and, after the decease of the Survivor, with the payment of 10,000 *l.* to Trustees in Trust for the younger Children of the Marriage. About a year afterwards, the Testator, by a Codicil, disposed of a certain portion of his Property not before mentioned, and, in all other respects, confirmed his Will. The Testator died a Bachelor. His Brother afterwards died leaving Issue *Julia* and five other Daughters. Held that the Provision made by the Settlement was not a satisfaction of the Provision made by the Will.

An Uncle made a Provision for his Niece by his Will, and afterwards by a Settlement on her Marriage. The question being whether the latter was intended to be a satisfaction of the former, extrinsic Evidence is admissible to show that the Uncle stood *in loco parentis* to his Niece.

No Person can be held *in loco parentis* to a Child whose Father is living and who resides with and is maintained by the Father according to his means.

reversed 3 N & C 359

Daughters. In 1813, the eldest Daughter married Sir *Richard Simeon*; and, on that occasion, Sir *J. Barrington*, by a Deed to which his Brother was not a Party, charged his Reversion in Fee in the *Swainston* Estate with the Payment of 10,000*l.* to the Trustees of the Settlement, in Trust for Sir *Richard* and Lady *Simeon*, for their lives successively, and, after the death of the Survivor, for their Children: and, on the same occasion, Sir *John* made a Will, by which he gave his Reversion in Fee, to Trustees, for 1,000 Years, in Trust to raise 50,000*l.*, which he gave to the Five younger Daughters of his Brother, equally, on their attaining 21, or marrying; and, subject thereto, he devised the Reversion to Lady *Simeon* and her Sisters for their lives successively, with remainders to their first and other Sons in Tail-male.

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Sir *John* subsequently obtained a Lease, from Trinity College, *Cambridge*, of the Rectory and Tithes of *Hadfield Broad Oak*, in *Essex*.

In the beginning of the year 1817, the Plaintiff, *Henry Philip Powys*, with the knowledge and sanction of Sir *John* and of *Fitzwilliam Barrington*, paid his Addresses to *Julia*, the third Daughter of *Fitzwilliam Barrington*, and a Marriage was, afterwards, agreed upon between them.

Sir *John*, by his Will dated the 28th of March 1817, gave to his Sister-in-law, *Edith Mary Barrington*, the Wife of his Brother, *Fitzwilliam*, (after the death of the Survivor of himself and Brother) an Annuity of 800*l.*, for life, charged upon his Reversion in Fee in the *Swainston* Estate; and, subject thereto, he devised the Reversion to *William Browne* and the Rev. *John*

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Mansfield, for the term of 1,000 Years, upon the Trusts thereafter mentioned; and, subject thereto, he gave his said Reversion, and also all his other Real Estates, except his Lease of the Rectory and Tithes of *Hadfield Broad Oak*, to his Daughters successively in Tail-male, with remainder to his Niece *Louisa*, wife of Sir *Richard Simeon*, and eldest Daughter of his Brother, *Fitzwilliam Barrington*, for her life, with remainder to her first and other Sons successively in Tail-male, with remainders, in like manner, to his other Nieces, the younger Daughters of his Brother, for their lives, and to their Sons in Tail-male successively.

And he gave the Rectory and Tithes to *Browne* and *Mansfield*, in Trust to accumulate the Rents during the life of his Brother, *Fitzwilliam*; and, after the decease of the Survivor of himself and his Brother, to sell the Rectory and Tithes, and invest the Proceeds in the usual Securities, and to stand possessed thereof, and of the Monies which should arise and be accumulated from the Rents of the Rectory and Tithes during the life of his Brother, upon the Trusts after mentioned.

And he gave all the 5 *l.* per Cent. Stock which he might have at his decease, or, in case those Stocks should be paid off during his lifetime, then all the New 4 *l.* per Cent. Stock which he might have at his decease, to the same Trustees, upon Trust to accumulate the Dividends during the life of his Brother, and, after the decease of the Survivor of himself and his Brother, to stand possessed of the Stock and Accumulations upon the Trusts thereafter mentioned.

And he declared that the Term of 1,000 Years was limited to *Browne* and *Mansfield* in Trust, after the

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decease of the Survivor of himself and his Brother, in case they should both die without leaving any Issue Male of their respective bodies, or in case either of them should leave any such Issue Male and all such Issue Male should die under the age of 21 Years, then, immediately after the death of such Issue Male under the age of 21 Years, to levy and raise, by Sale or Mortgage of the Hereditaments comprised in the Term, such Sum of Money as would, with the Monies to arise from the Rents of the Rectory and Tithes and from the Accumulations thereof, and from the Sale of the Rectory and Tithes, and with the 5 *l.* per Cent. or 4 *l.* per Cent. Stock and the Accumulations thereof, make up the clear Sum of 50,000 *l.*, it being his Will that that Sum should be raised by the means aforesaid, and that the Rents of the Rectory and Tithes and the Accumulations thereof, and the Monies to arise from the Sale thereof, and the 5 *l.* per Cent. or 4 *l.* per Cent. Stock and the Accumulations thereof should be first applied towards the raising of the 50,000 *l.*; and that the Hereditaments comprised in the Term should be liable to raise the deficiency only.

And he directed the Trustees to invest the 50,000 *l.* in the usual Securities and to stand possessed thereof upon the Trusts thereafter mentioned: and, after directing One-fifth part of the 50,000 *l.* to be held upon Trusts, for the benefit of his Niece *Jane Elizabeth Barrington*, the Second Daughter of his Brother *Fitzwilliam*, and her Husband and Issue (if any) and with Limitations over corresponding with the Trusts and Limitations hereinafter mentioned with respect to the Share of his Niece *Julia*, he directed the Trustees to pay the further Sum of 10,000 *l.*, being one other Fifth part of

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the 50,000 l., unto *his Niece, Julia Barrington, the Third Daughter of his Brother Fitzwilliam*, for her life, and, after her decease, in case she should leave any Husband her surviving, then to pay the Dividends thereof to *such surviving Husband* of his Niece *Julia*, for his Life, and, after the decease of such surviving Husband of his Niece *Julia*, or, in case she should leave no Husband, then, after her Decease, to stand possessed of the last-mentioned Sum of 10,000 l. in Trust for *all and every the Children and Child of his Niece Julia who should be then living, and the Issue of any of them who should be then dead leaving Issue*, such Issue to take equally amongst them the Shares of their respective Parents, equally to be divided between and amongst such Child and Children and their Issue as aforesaid, share and share alike, and to be vested and transmissible Interests in such Child and Children at the usual periods, with benefit of Survivorship amongst such Children and their Issue respectively, in case of the death of any of them before their respective Shares should become vested : And in case no Child of his Niece *Julia*, nor the Issue of any such Child should obtain a vested Interest in the said last-mentioned Sum of 10,000l., then he directed his Trustees to stand possessed of that Sum in Trust for the Person and Persons who, for the time being, should be entitled to his Manors, Messuages, &c. thereinbefore devised, under the Limitations thereinbefore contained, and for such Estate and Interest, Estates or Interests, as the same Person or Persons should be entitled to therein, or as near thereto as the rules of Law and Equity would permit; it being his Will that, in the event of no Child or Children, nor the Issue of any Child or Children of his Niece *Julia* obtaining a Vested Interest in the last-mentioned Sum of 10,000l.,

then that the same should sink into and become incorporated with his said Manors, Messuages, &c., thereinbefore devised, for the benefit of the Person and Persons entitled thereto.

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And he directed that the remaining three Fifth parts of the 50,000*l.* should be held upon Trusts for the benefit of his Nieces, *Ann Emma, Ellen Flack, and Mary*, their Husbands and Issue (if any), and with Limitations over corresponding with the Trusts and Limitations of the two other Fifth parts: And he directed that no part of the Hereditaments comprised in the Term of 1,000 Years, should be sold, until some or one of the Sums of 10,000*l.* thereinbefore provided for his said five Nieces and their Children, or some part thereof, should have become vested in and payable to their Children, nor until the other Funds out of which he had directed the 50,000 *l.* to be raised, should have been applied in payment of those Sums of 10,000*l.*: And he gave, to *Edith Mary Barrington* and her Daughters, 100 *l.* each to buy Mourning, and the residue of his Personal Estate to his Brother *Fitzwilliam*, and appointed him sole Executor of his Will.

On the 20th of April 1817, the Proposals for the Settlement on the Marriage of the Plaintiff with *Julia Barrington*, were forwarded, by Sir *John* or his Solicitor, to the Plaintiff.

The Terms of the Settlement having been arranged between Sir *John Barrington* and the Plaintiff, without any interference on the part of *Fitzwilliam Barrington*, by an Indenture dated the 2d day of June 1817, and made between the Plaintiff and his Father and Mother, Sir *John Barrington, Julia Barrington, who was described as the Niece of Sir John Barrington* and one

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of the Daughters of *Fitzwilliam Barrington*, (*who was not a party to the Deed,*) and certain other Persons, after reciting, (amongst other things) the intended Marriage, and that, *in consideration of the natural love and affection which Sir John Barrington had and bore to his Niece Julia Barrington, and for her advancement in life, and to provide a maintenance for her*, in addition to the Provision thereafter made for her by the Plaintiff's Father and Mother and by the Plaintiff, and for enabling the said *Julia Barrington* to carry into effect the Contract and Agreement for a Settlement as thereafter expressed, *Sir John Barrington* had agreed to charge his Reversion in Fee in the *Swainston* Estate with the Payment of the annual Sums and Sum in gross thereafter mentioned, in the event, and to be applied to the Uses and upon the Trusts thereafter expressed: And that it had been agreed, between the plaintiff's Father and Mother, *Sir John Barrington*, the Plaintiff and *Julia Barrington*, that such Provision and Settlement should be made for the Plaintiff and *Julia Barrington*, in the event of her surviving her intended Husband, and also for the Issue of the intended Marriage, and other Settlements, Benefits, Powers, Provisoes and Limitations as were thereafter expressed and contained: It was (amongst other things) witnessed that, in performance of the recited Agreement on the part of *Sir John Barrington*, and for the considerations therein mentioned, and, particularly, *in consideration of the natural love and affection which Sir J. Barrington had and bore to Julia Barrington his Niece*, *Sir John Barrington* covenanted with the Plaintiff and *Julia Barrington* that his Reversion in Fee in the *Swainston* Estate, and all other Manors, Messuages, &c., whereof *Sir John Barrington* then received the Rents for his life, should, after the decease of the Survivor of himself and his Brother *Fitz-*

William Barrington without Issue Male, but not before, or, in case there should be any Issue Male of Sir *John* or of his Brother living at the death of such Survivor, and all such Issue Male should afterwards die under 21, then after the death of such Issue Male, stand charged with the payment, to the Plaintiff for his life, of an annual Sum equal to the Interest of a Sum of 10,000*l.* at the rate of 5 *l.* per Cent., and, after his decease, with the payment of the like Sum to *Julia Barrington*, for her life, and, after the decease of the Survivor, in case there should be any Issue of the Marriage, and until some or one Child, being a Son, should attain 21, or, being a Daughter, should attain that age or be married, with the Payment, to the Trustees of the Settlement, of a like annual Sum, to be applied by them for the maintenance, education, and support of all the Children of the Marriage except an eldest or only Son, but in case there should be only one Child, then for the maintenance &c. of such Child, or, otherwise, to suffer the same, or such part or parts thereof as the Trustees should think proper, to accumulate for the benefit of any such Children or Child as the case might be; and, immediately after any such Child, being a Son, should attain 21, or, being a Daughter, should attain that age or be married, or in case any Child or Children, being a Son or Sons, should have attained 21, or, being a Daughter or Daughters, should have attained that age or be or have been married at the decease of the Survivor of the Plaintiff and *Julia Barrington*, then, after the decease of the Survivor of them, with the payment of the gross Sum of 10,000*l.* to the Trustees, to be held by them upon the Trusts thereafter declared: And Sir *John Barrington* further covenanted that the annual Sums should be issuing and payable and raised and paid out of the Rents of the said Hereditaments, and

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and that the Plaintiff and *Julia Barrington* and the Trustees should have, and they were thereby invested with a power of Distress, Entry and Sale for the levying thereof on the Premises; and also that the annual Sums, in case the Rents should, at any time, be insufficient, should be raised by Sale or Mortgage of a competent part of the Premises, and that the 10,000*l.* when the same should become raisable, should be raised by sale or mortgage of a competent part thereof: And Sir *John Barrington* charged all the Hereditaments then vested in or belonging to him, and of which he then received the Rents for his life, and of which the Reversion in Fee was then vested in him, with the payment of the same annual Sums and the said Sum of 10,000*l.* accordingly: And Sir *John Barrington*, for himself and his Heirs, covenanted with the Trustees, to stand seised of the Reversion and Fee-simple of the *Swainston* Estate, to the use of the Trustees, their Heirs and Assigns, for enabling them to raise the said Sums in manner aforesaid, and, subject thereto, to the use of himself in Fee: And it was thereby agreed between all the Parties thereto, and Sir *John* directed that the Trustees should stand possessed of the 10,000*l.* when raised, upon the following Trusts, that is to say, in case there should be Issue of the Marriage an eldest or only Son and one or more or other Child or Children who, being a Son or Sons, should attain 21, or, being a Daughter or Daughters, should attain that age or be married, then in Trust for such Child or Children other than and except an eldest or only Son, and if but one, then for such one Child, his or her Executors, &c., and, if more than one, equally to be divided amongst them, and to be vested and transmissible Interests in them respectively at the ages and times aforesaid, and to be then paid to them if the 10,000*l.* should have become

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raisable, but if not, then as soon as the same should become raisable. "And the same Sum, and every part thereof shall be, and the same is hereby made, limited and settled so as to admit of and with benefit of Survivorship between and amongst such Children and their Issue respectively, in case of the death of any one or more of them leaving Issue respectively, before he, she or they shall have obtained a vested Interest or vested Interests in the said Sum of 10,000*l.* under the Trusts aforesaid:" And, in case there should be Issue of the Marriage an eldest or only Son or only Daughter and no other Child or Children, or, being such other Child or Children, in case no such Child or Children, or Issue of such Child or Children should obtain a vested Interest in the 10,000*l.*, then in Trust for such eldest or only Son or only Daughter, as the case should be, and to vest in and be paid to him or her, at the respective times aforesaid: And, in case of the death of such eldest or only Son or Sons so becoming an only Child, as the case should be, without having obtained a vested Interest in the 10,000*l.* under the Trusts aforesaid, leaving Issue, then in Trust for such Issue, if more than one, share and share alike, and, if but one, then for such one absolutely, and to vest in and be paid to such Issue at the like ages and times aforesaid, and in like manner as thereinbefore directed and declared concerning the said Sum of 10,000*l.* in case and in the event of the same becoming vested and payable to any Children or Child of the Marriage*: And the Trustees were directed, after the 10,000*l.* should have become raisable, to invest the Shares thereof which should not be actually payable, in the usual Securities, and to apply a sufficient part of the Interest for the Mainte-

* So in copy Settlement.

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nance Education and Support of the persons presumptively entitled to the Principal, and to accumulate the residue of the Interest for the benefit of the same persons: And the Trustees were empowered to apply one-fourth of the Shares for the advancement of the persons presumptively entitled thereto: provided that in case Sir *John Barrington*, his Heirs, Devisees, or Assigns, or other the person or persons for the time being entitled to the Hereditaments the Reversion whereof was so charged as aforesaid, should, either before or as soon as the 10,000 *l.* should become raisable, pay the Sum of 10,000 *l.* to the Trustees, then the aforesaid charges of the annual Sums and of the gross Sum of 10,000*l.*, should cease: And, if such payment should be made in the lifetime of the Plaintiff and *Julia Barrington*, the Trustees were directed to invest the same Sum in the usual Securities and pay the Interest to the Plaintiff and to *Julia Barrington* for their lives successively, in lieu of the annual Sums made payable to them as aforesaid, and, after the Decease of the survivor of them, the Trustees were to stand possessed of the 10,000*l.*, so to be paid to them, upon the Trusts thereinbefore declared concerning the 10,000*l.* charged on the Reversion of the said Hereditaments, and in exoneration thereof*.

The Marriage was solemnized shortly after the Execution of the Settlement.

On the 23d of June 1818 Sir *John Barrington* made a Codicil to his Will, which was duly executed and attested, and was as follows: "Whereas I have lately

* The above statement of the Settlement was correctly taken from a copy of it.

conveyed, to the Vicar for the time being of the Parish of *Hadfield Broad Oak* in the County of *Essex*, a Messuage in the Town of *Hadfield Broad Oak* called *Chalks*, to be, for ever thereafter, held and enjoyed as a Vicarage House, but have reserved to myself, my Heirs and Assigns, the Pond or Orchard on the east of the same Premises, and which I have since laid to the Premises adjoining now in the occupation of *Thomas Cocks*: Now it is my Will that such Pond and Orchard shall, for ever hereafter, be attached to the same Premises: and I give and devise the same to the Owners and Proprietors of the said Premises, to be held and enjoyed by them in succession, upon the same Trusts and for the same Uses, Estates, &c. as the said Messuage shall be, from time to time, held and enjoyed: also I give and dispose of the Pew in the Parish Church of *Hadfield Broad Oak* aforesaid, which also lately belonged to the said Premises called *Chalks*, and reserved by me as aforesaid, unto and to the use of the Proprietors and Owners for the time being of the *Barrington* Estate in *Essex*, for ever hereafter: *and in all other respects I confirm my said Will.*"

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On the 7th of July 1818 Sir *John* made another Codicil, which also was duly executed and attested; but he did not, thereby, alter any of the Devises or Bequests in his Will or former Codicil.

On the 11th of July 1818, Sir *John* wrote a Letter to his Brother, from *Barrington Hall*, his Seat in *Essex*, which was as follows:

My dear Brother:

I should quit life with the greatest dissatisfaction, if I

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did not leave, in your hands, a written Testimony of my full conviction of your unceasing affection and attention to me at all times : and, beyond that, I have greatly to admire your never-failing forbearance for so many years past, so as never to have been induced, in any single instance, during that long period, to deviate from it ; I mean with respect to the slightest intimation that an advance of Money might be desirable, if not necessary to you : founding this, and with great truth, on a confidence in me that I was always preparing to supply you with Cash *en masse*, not always readily attainable. Whenever it has chanced to pass over my imagination, at any time for years past, that I might possibly survive you, I have always turned from it as the greatest affliction that could possibly befall me. I thank God it will now happen otherwise in the natural course of Succession. I trust I shall be found, on the whole, to have been more of a just than an unjust steward. When *Louisa* married, I was induced to make a disposal of the *Isle of Wight* Property for the benefit of your Family. *On the marriage of Julia, I found occasion to make another Will, improved upon, I hope, by the destination of my Tithe Property in Essex, in Trust to form a Consolidated Fund, eventually to aid the very heavy Demands that will be found to press upon the Isle of Wight Estate.* This will become a Sum of no inconsiderable amount. In the formation of these Wills I have acted, altogether, free from any personal consideration whatsoever, following the order of priority of Birth as the rule for it. God bless you, my dear Brother, my Sister, and all your six Children. I remain, &c."

The Testator died, on the 5th of August 1818, without Issue, leaving his Brother *Fitzwilliam*, who there-

upon became Sir *Fitzwilliam Barrington*, his only Brother and Heir-at-Law.

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Julia, the Plaintiff's Wife, died in September 1821, leaving Issue a Son, her only Child.

Jane Elizabeth Barrington remained unmarried. *Ann Emma Barrington* died unmarried shortly after the Testator. In May 1824 *Ellen Flack Barrington* married *I. G. Campbell*, and died in May 1832, leaving Two Children, *Walter* and *Charlotte*. *I. G. Campbell* died in 1830. In 1827 *Mary Barrington* married *T. Vandeleur*, and died in 1829 without issue. Lady *Barrington*, Sir *Fitzwilliam's* Wife, died in 1829. Sir *Fitzwilliam* died on the 26th September 1832, having, by his Will, given one moiety of his Personal Estate to *Jane Elizabeth Barrington*, and the other Moiety, to *Walter* and *Charlotte Campbell*, subject to the payment of a Legacy of 200 l. to the Plaintiff's Son by his late Wife, and of a Legacy of 100 l. to each of the Younger Children of his Daughter, Lady *Simeon*, and of a Legacy of 400 l. to *T. Vandeleur*, the Husband of his late Daughter *Mary*.

On Sir *Fitzwilliam's* death, Lady *Simeon*, *Jane Elizabeth Barrington*, *Philip Lybbe Powys*, the Infant Child of the Plaintiff by *Julia* his late Wife, and *Walter Campbell*, became the Co-heirs of Sir *John Barrington*, and Lady *Simeon* became Tenant for Life in Possession, with remainder to her Eldest Son in Tail-male, of the *Swainston Estate*.

After Sir *Fitzwilliam's* death, a Document in his own handwriting, was found amongst his Papers, contain-

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by his Will, in discharge of such duty ; that the Plaintiff, on his Marriage, treated and negotiated with Sir *John* solely and exclusively ; and that, at the time of making the Settlements and frequently afterwards, Sir *John* declared his intention to be that the Provision made by him, by the Settlement, for the benefit of the Plaintiff and his Wife and their Issue, should be in satisfaction of the Provision made, for Mrs. *Powys*, her Husband and Children, by his Will.

A Music-master and a Drawing-master, who had given Lessons to the young Ladies, and a Dress-maker who had been employed by them, were examined as Witnesses for the Plaintiff. They deposed that their Bills were paid by Sir *Fitzwilliam* and Lady *Barrington*.

Evidence was given, on the part of Sir *Richard* and Lady *Simeon* and their Son, for the purpose of proving, first, that Sir *John Barrington* stood in *loco parentis* to his Nieces ; and, secondly, to prove declarations, made by Sir *John*, that he intended the Settlement to be in lieu of the Provision made by his Will for his Niece *Julia*, her Husband and Issue.

The Witnesses deposed, as to the first point, as follows: That Sir *Fitzwilliam*, in compliance with the wishes of Sir *John*, resided near Sir *John* in the *Isle of Wight*, and maintained a more expensive Establishment than his Income (which did not exceed 400 *l.* a year) would allow of: that Sir *John* and his Brother lived on the most affectionate terms with each other: that, for several years, Sir *John* gave Sir *Fitzwilliam* 1,000*l.* a-year: that he took the greatest interest in his Nieces, behaved to them as a Father, and always acted towards them as

the kindest of parents, not showing more partiality to one than to another: that he frequently gave them Pocket-money and made them other Presents, and, occasionally, advanced Money to defray the expence of their Clothing and Education: that he allowed them to use his Horses and Carriages, and had them frequently to dine with him, and that one or other of them was almost always staying in his House: that he was consulted as to the appointment of their Masters and Governesses, and as to the Marriages of such of them as were married, and that, on the Plaintiff's Marriage, the terms of the Settlement were negotiated between the Plaintiff and Sir *John*, and their respective Solicitors, without any interference on the part of Sir *Fitzwilliam*: that Sir *John*, who gave the instructions for the Settlement on the 20th of April 1817, proposed that the 10,000*l.* should be settled on *all* the Children of the Marriage, but, afterwards, on the suggestion of the Plaintiff, it was agreed that the 10,000*l.* should be settled on the Younger Children only, as the Eldest Son would be entitled to a considerable Estate on his Father's side.

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The Witnesses who were examined as to the Declarations made by Sir *John Barrington*, were his confidential Solicitors and some of his Relations and intimate Friends. The substance of their Evidence was that they had heard Sir *John* say that he did not intend to give his younger Nieces more than 10,000*l.* a-piece, and that he meant to limit the *Swainston* Estate to his eldest Niece, Lady *Simeon*, and her Issue Male, so as to place her in the situation of an eldest Son, and that his object in purchasing the Tithes of *Hadfield Broad Oak*, and directing the Rents to be accumulated, was to form a Fund to relieve his *Swainston* Estate from the

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burthen of providing the 50,000*l.*: that, both before and after the execution of the Settlement, Sir *John* uniformly spoke of the Fortune of *Julia*, as well as of the other younger Daughters of his Brother, as being 10,000*l.* and no more: and two of the Witnesses said that *they believed and had always understood*, from declarations made by Sir *John*, that he considered the Provision made, by the Settlement, for his Niece *Julia*, was in lieu and satisfaction of that which he had provided for her by his Will.

Mr. *Knight*, Mr. *Jacob*, Mr. *Walker*, Mr. *Chandless* and Mr. *Pole*, for the Plaintiff and the Defendant his infant Son, contended that a person could not stand *in loco parentis* to a Child whose Father and Mother were living and who resided with them; and that the Evidence showed that Sir *John* stood *in loco parentis* to his Brother, and not to his Brother's Children: that the Provision by the Will was not called a Portion, nor was it in the nature of a Portion, as it was not to be raised until after the death of Mrs. *Powys's* Father: that the Provision by the Settlement was charged only on the Reversion of the *Swainston* Estate, and was dependent on the contingencies of Sir *John* and Sir *Fitzwilliam Barrington* dying without leaving Issue Male who should attain 21; whereas the Provision by the Will was to be raised out of the Rectory and Tithes and the Stock, as well as the Reversion of the *Swainston* Estate, and, consequently, that Provision was certain, so far at least as the Rents and Stock would extend to raise it: that the Provision by the Will extended to every Husband that Mrs. *Powys* might marry, and to *all* the Children she might have by them; but the Provision by the Settlement was confined to the Husband and younger Children of the then intended Marriage: that

Sir *John's* letter of July 1818, showed, conclusively, that his Will was made with reference to the intended Marriage between Mr. and Mrs. *Powys*: that, if the Provision by the Will was satisfied or adeemed by the Settlement, the first Codicil, by confirming the Will, restored or revived it: that Evidence was not admissible to raise the Presumption, especially as Sir *John Barrington* did not stand in *loco parentis* to Mrs. *Powys*. *Bellasis v. Uthwatt* (a); *Shudal v. Jekyll* (b); *Roome v. Roome* (c); *Grave v. Lord Salisbury* (d); *Powel v. Cleaver* (e); *Perry v. Whitehead* (f); *Ex parte Pye* (g); *Wetherby v. Dixon* (h); *Brown v. Peck*, (i); *Watson v. Lord Lincoln* (k); *Rachfield v. Careless* (l); *Brown v. Selwin* (m); *Farnham v. Phillips* (n); *White v. Evans* (o); *Druce v. Denison* (p); *White v. Williams* (q); *Whitaker v. Tatham* (r); *Robinson v. Whitley* (s); *Debene v. Mann* (t); *Spinks v. Robins* (u); *Nicholls v. Judson* (x); *Barret v. Beckford* (y); *Mathews v. Mathews* (z); *Crompton v. Sale* (a); *Tinney v. Tinney* (b); *Freemantle v. Banks* (c); *Osborne v. The Duke of Leeds* (d); *Trimmer v. Bayne* (e); *Lang-*

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| (a) 1 Atk. 426, see 427, note. | (o) 4 Ves. 21. |
| (b) 2 Atk. 516, see 518. | (p) 6 Ves. 385, see 397. |
| (c) 3 Atk. 181, see 183. | (q) Coop. C. C. 58. |
| (d) 1 Bro. C. C. 425. | (r) 7 Bing. 628. |
| (e) 2 Bro. C. C. 499, see 517. | (s) 9 Ves. 577. |
| (f) 6 Ves. 544, see 548. | (t) 2 Bro. C. C. 165 & 519. |
| (g) 18 Ves. 140, see 152, et seq. | (u) 2 Atk. 491. |
| (h) 19 Ves. 407. | (x) <i>Ibid.</i> 300. |
| (i) 1 Eden, 140. | (y) 1 Vez. 519. |
| (k) Amb. 325, see 327. | (z) 2 Vez. 635. |
| (l) 2 P. W. 158. | (a) 2 P. W. 553. |
| (m) Ca. Temp. Talb. 240. | (b) 3 Atk. 8. |
| (n) 2 Atk. 215. | (c) 5 Ves. 79. |
| | (d) 5 Ves. 369. |
| | (e) 7 Ves. 508. |

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ham v. Sanford (f); Hartopp v. Hartopp (g); Gladding v. Yapp (h); Hurst v. Beach (i); Holmes v. Holmes (k); Mackenzie v. Mackenzie (l); Heather v. Rider (m); Wharton v. Lord Durham (n).

Pigott v. Waller (o); Attorney-general v. Heartwell (p); Jackson v. Hurlock (q); Coppin v. Fernyhough (r) Alford v. Earle (s); Rider v. Wager (t); Williams v. Goodtitle (u); Doe v. Kett (x); Smith v. Dearmer (y); Acherley v. Vernon (z); Gordon v. Lord Reay (a); Hinzman v. Poynder (b).

Sir C. Wetherell, Mr. Kindersley, Mr. Wray, and Mr. Bethell, for the Defendants, Sir Richard and Lady Simeon and their Infant Son :

The Will and the Recitals in the Settlement, (the Terms of which were proposed by Sir John Barrington and arranged between him and the Plaintiff, without any interference on the part of Sir Fitzwilliam who was not a Party to the Settlement) clearly show that Sir John stood *in loco parentis* to Mrs. Powys. Sir John's bounty to his Brother was intended to benefit not him alone, but the whole of his Family. There is no authority for saying that the *locus parentis* is con-

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| (f) 2 Mer. 6, <i>see</i> 17 & 23. | (g) 2 Eden, 263, S. C. Amb. |
| (g) 17 Ves. 184, <i>see</i> 190. | 487. |
| (h) 5 Madd. 56. | (r) 2 Bro. C. C. 291. |
| (i) <i>Ibid.</i> 351, <i>see</i> 359. | (s) 2 Vern. 209. |
| (k) 1 Bro. C. C. 555. | (t) 2 P. W. 328, <i>see</i> 333. |
| (l) 2 Russ. 262. | (u) 10 Barn. & Cress. 895. |
| (m) 1 Atk. 425. | (x) 4 T. R. 601. |
| (n) <i>Ante</i> , vol. 5. 297. | (y) 3 Young & Jer. 278. |
| (o) 7 Ves. 98. | (z) 3 Bro. P. C. 85. |
| (p) 2 Eden, 234, S. C. Amb. | (a) <i>Ante</i> , vol. 5, 274. |
| 451. | (b) <i>Ibid.</i> 546. |

fined to the condition of Orphanage ; *Perry v. Whitehead* (c).

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In order to raise a Case of Satisfaction, it is not necessary that the Provision by the Will should be called a Portion, but it is sufficient if, as in this Case, it has all the characteristics of a Portion. Sir *John* directed, by his Will, that the 10,000*l.* should sink in case none of *Julia's* Issues should obtain a vested Interest in it, and did not give it over to his other Nieces ; therefore, he clearly showed that he did not intend any of them to have double Portions: and the Evidence proves that Sir *John's* main intention was to make the *Swainston* Estate the Family Estate, and that it should go to Lady *Simeon* as little incumbered as possible; and, with that view, he devoted the *Hadfield* Tithes to the raising of the Portions. In deciding on questions of Satisfaction, the Court does not regard slight differences ; it only looks to see whether the principal object of both the Provisions is the same Person. Here Mrs. *Powys* was the principal object of both Provisions, and the intention of both of them was the same, namely, to limit the 10,000*l.* in the manner most beneficial to her, under the existing circumstances. The Will and the Settlement are, in many respects, identical : the discrepancies between them are owing to the Marriage being uncertain when the Will was made; and, on that account, Provision was made for every Husband that Mrs. *Powys* might marry, and for the Issue of every Marriage she might contract. Sir *John Barrington* originally proposed that the 10,000*l.* should be settled on all the Children of the Marriage ; but, as his Niece was

(c) See 6 Ves. 546. *et seq.*

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going to marry a Man of large Landed Property, the eldest Son was, at Mr. *Powys's* suggestion, excluded; he will, however, take the 10,000 *l.*, if he is an only Child. Sir *John's* motive in making the Provisions, was affection for his Niece, and not for her Issue: and the discrepancies between the two Provisions, are not sufficient to prevent Ademption: in both instances the Testator had in view the giving of a Portion of 10,000*l.* to his Niece. *Monck v. Monck* (d). The Case of *Skudal v. Jekyll* is no authority for the proposition that the *locus parentis* cannot exist except where the Child is an Orphan. The Case put by the *Lord Chancellor*, was put by way of illustration merely. In *Grave v. Lord Salisbury*, the thing given was a Lease. In *Powell v. Cleaver*, a gross Sum, not described as a Portion, was given by the Will, and the Parties did not stand in the relative situations of Parent and Child. In *Ex parte Pye*, also, a gross Sum was given, and, in making the Gift, the Testator described the Legatee as the Child of another Man, and, therefore, the presumption was excluded. In *Wetherby v. Dixon* and *Brown v. Peck*, the circumstances were not sufficient to show that the Legacy was meant to be adeemed. *Debeze v. Mann* merely establishes that, in order to raise a Case of Satisfaction as between Strangers, identity of purpose in making the Gifts, is necessary. In this Case the purposes of the two Provisions are identical; the only difference is in the mode of carrying the purpose into effect. In *Trimmer v. Bayne*, Lord *Eldon* held that the Portion was an Ademption of the Legacy, because the purpose of both Gifts was the same: that Case, therefore, is in our favour.

(d) 1 Ball. & Beatt. 298.

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Next, with respect to the admissibility of the Evidence to raise the Presumption. Most of the Cases in which the Evidence has been rejected, are Cases in which the Settlement was made first, and the Will afterwards. There, of course, Evidence is not admissible; for Evidence cannot be given to explain or contradict a written Instrument. Our object is not to show what Sir *John Barrington* meant by his Will, but what was his intention in doing a subsequent, independent act. The Authorities are uniform, that Evidence may be produced to show the Intention with which the Testator made the Advance in his lifetime. *Monck v. Monck*; *Thellusson v. Woodford* (e); *Rosewell v. Bennett* (f); *Biggleston v. Grubb* (g); *Mascal v. Mascal* (h); *Chapman v. Salt* (i); *Weall v. Rice* (k); *Lloyd v. Harvey* (l); *Sheffield v. Lord Coventry* (m).

The Codicil, though it confirmed the Will, could not have the effect of restoring the adeemed Legacy; for the Rule of Law is that an adeemed Legacy forms no part of the Will. *Rider v. Wager*. The confirmation merely amounts to a Declaration that the Will shall remain as it stood at the date of the Codicil, except so far as it was thereby altered. *Crosbie v. MacDoual* (n); *Irod v. Hurst* (o); *Monck v. Monck*; *Drinkwater v. Falconer* (p); *Booker v. Allen* (q). There is no Case that decides that an adeemed Legacy is restored by a

(e) 4 Madd. 420.

(f) 3 Atk. 77.

(g) 2 Atk. 48.

(h) 1 Vez. 323.

(i) 2 Vern. 646.

(k) 2 Russ. & Myl. 251.

(l) *Ibid.* 310.

(m) *Ibid.* 317.

(n) 4 Ves. 610.

(o) 2 Freeman, 224.

(p) 2 Vez. 623.

(q) 2 Russ. & Myl. 270.

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Codicil which confirms the Will. The Case of *Roome v. Roome* contains merely a *dictum* on the point.

Mr. *Jemmett*, Mr. *Sewell*, and Mr. *Short* appeared for the other Defendants.

THE VICE-CHANCELLOR :

The late Sir *John Barrington* was Tenant for life, with remainders to his first and other Sons in Tail-male, with remainder to his Brother *Fitzwilliam Barrington* for life, with remainders to his first and other Sons in Tail-male, with divers remainders over, of an Estate in *Essex*, called the *Barrington Estate*. Sir *John* also was Tenant for Life, with remainders to his first and other Sons in Tail-male, with remainder to his Brother, *Fitzwilliam*, for Life, with remainders to his first and other Sons in Tail-male, with the Reversion to himself in Fee, of an Estate, in the *Isle of Wight*, called the *Swainston Estate*. Sir *John* was an unmarried man: his Brother was married, and had six Daughters. In 1813 *Louisa*, the eldest Daughter, married a Son of the late Sir *John Simeon*: and, on the occasion of that Marriage, Sir *John Barrington*, by a Deed to which his Brother was not a Party, charged his Reversion in Fee in the *Swainston Estate* with a Sum of 10,000*l.*, to be raised, by Sale or Mortgage, immediately after the decease of the Survivor of himself and his Brother without Issue Male, but not before, or, in case there should be any Issue Male of either of them living at the death of such Survivor, and all such Issue Male should afterwards die under 21, then immediately after the death of such Issue Male: and the Money when raised was to be paid to Trustees upon the Trusts of the Deed.

After the Settlement had been made on the Marriage of Miss *Louisa Barrington*, Sir *John Barrington*, as I collect from the Evidence, purchased the Rectory and Tithes of *Hadfield Broad Oak* in *Essex*.

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In the beginning of the year 1817, Mr. *Powys*, the Plaintiff, with the knowledge and approbation of Sir *John Barrington*, paid his addresses to Miss *Julia Barrington*, who was the third Daughter of *Fitzwilliam Barrington*. On the 28th of March 1817, Sir *John Barrington* made his Will: and it distinctly appears, from a Letter which he wrote in the subsequent year, that he made that Will with reference to the intended Marriage of Miss *Julia*. [His Honor then stated the substance of the Will, and observed that the Testator, when he mentioned his Brother's Daughters, described them as his Nieces, the Daughters of his Brother *Fitzwilliam*.] Now, with respect to that Clause which directs that, in the event of no Child, nor the Issue of a Child, of any of his Nieces, obtaining a vested Interest in the several Sums of 10,000*l.*, the same shall sink into and become incorporated with his Manors, Messuages, &c. therein-before devised, for the benefit of the Person or Persons entitled thereto, there certainly might arise a question whether the Testator meant that the whole Fund should sink, or that so much as might have arisen from the *Swainston* Estate, should sink, and that so much as might have arisen from the *Hadfield Broad Oak* Estate and the Stock, should be taken, as a Personal Gift, by the Person or Persons entitled to the *Swainston* Estate.

The next Instrument is the Settlement on the Marriage of Miss *Julia Barrington* with the Plaintiff; to which Sir *John* was a Party, but his Brother was not a

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Party. It was dated the 2d of June 1817, and the young Lady who was about to be married, was described in it as *Julia Barrington*, Spinster, Niece of Sir *John Barrington*, and one of the Daughters of *Fitzwilliam Barrington*. [His Honor then stated the Recitals and operative part of the Settlement.]

On the 23d of June 1818, Sir *John Barrington* made a Codicil, which was duly executed and attested; and, after disposing of a Pond and Orchard, and of a Pew in the Parish Church of *Hadfield Broad Oak*, he, in all other respects, confirmed his Will. On the 7th of July in the same year, Sir *John* made a second Codicil, which also was duly executed and attested, but did not contain the Clause of Confirmation. It would, however, by operation of Law, be a republication of his Will; and, on the 5th of August 1818, Sir *John* died.

There was Issue of the Marriage between Mr. *Powys* and Miss *Julia Barrington*, one Child only, who is a Defendant in the Suit: and the Bill has been filed, by Mr. *Powys*, raising the question whether he is not entitled to receive the Interest, for his Life, of the Sum of 10,000 *l.* under the Settlement, and of another Sum of 10,000 *l.* under the Will.

It was contended that Sir *John Barrington* stood in the situation of a Parent towards the Children of his Brother. But that question could not have been raised upon the language of the Instruments only; because, in both of them, from beginning to end, Sir *John* keeps most distinctly in view the circumstance that he stands in the situation of Uncle to his Brother's Children. Every one of the Children is successively spoken of, in

the Will, as being his Niece; and, in the Settlement, Miss *Julia Barrington* is described as being his Niece. But it was said that the Defendants were at liberty to enter into evidence in order to make out that, virtually and in substance, Sir *John* did stand in the situation of Parent towards his Nieces: and my Opinion is that the Parties are at liberty to enter into Evidence for the purpose of proving that circumstance: because, if the Instruments themselves do not state the fact, Parties must, of course, be at liberty to prove what the fact really is: and, accordingly, I thought it right, at the hearing, that the great mass of Evidence that has been given on the part of the Defendants, should be received for the purpose of proving that fact. But the whole of the Evidence amounts only to this, that Sir *John* was most affectionately attached to his Brother *Fitzwilliam*; that he did, in the most liberal manner, supply large Sums of Money for the Maintenance of his Brother; and that he acted in a very kind manner towards his Brother's Children. They occasionally dined at his house; they occasionally paid him visits, and had the use of his Horses and Carriages, and he made them Presents from time to time.

Besides there is a very important Document which is found in this Evidence, namely, a Letter of the 11th of July 1818, written by Sir *John Barrington* to his Brother. The Letter is in these words: "My dear Brother: I should quit life, &c. &c." There is also another Document, in the handwriting of *Fitzwilliam Barrington*, dated on the day on which Sir *John* died, and which is in the following words: "My most revered, worthy and beloved Brother, &c. &c." And Books and other Documents were produced showing

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that, upon particular days, large Sums were given by Sir *John* to his Brother. Therefore it is placed beyond all doubt that Sir *John's* great object of affection was his Brother *Fitzwilliam*. In considering the general question whether Sir *John* ought, upon the Evidence that has been given, to be held to have stood in the situation of a Parent to his Nieces, I have put this question to myself: whether any man would think that Sir *John* had departed from any moral obligation whatever, if, instead of making a disposition in favour of his Nieces, he had allowed the Reversion in Fee in the *Swainston* Estate to descend to his Brother, and had included the *Hadfield* Tithes in the Devise of his Personal Estate? It is, I think, plain that if, instead of indulging his own fancy in the disposition of that Property in favour of his Nieces, he had made no disposition of it at all, but let the Law take its course, or if he had, in express words, devised it to his Brother, no one could have said that he had violated any moral obligation. My Opinion is that the whole of this Evidence taken together, by no means establishes the fact that Sir *John* ever intended to place himself in the situation of a Parent to his Nieces, in the legal sense of the term; because the legal sense of the term is that the Party has so acted towards the Children as that he has thereby imposed upon himself a moral obligation to provide for them.

I have looked through all the Cases that I can find on the subject; and I cannot find any instance in which a Person has been held to stand in the situation of Parent to a Child, which Child had a Father living, and resided with and was maintained by its Father. I can easily understand that a Child may have a Father

living, but may be as effectually deserted by him as if he had been dead. But there is, I believe, no Case in which it has ever been held that a Person stood in the situation of Parent to a Child, which Child was living with, and was maintained by its Father according to his means. In this Case, so far from any presumption arising on the face of the written Instruments, the presumption is all the other way ; because, if there had been any parental feeling on the part of Sir *John* towards his Niece *Julia*, he would, in all probability, have shown it by using some less formal appellation than "*Niece*." But he has never done so : the objects of his bounty are, uniformly, characterized as what they were in their natural state, namely, his Nieces. Therefore no presumption whatever arises, either upon the face of the Instruments or from the facts which have been deposed to, that the Settlement was intended to be taken as a satisfaction of what was given by the Will. Besides the Defendants, in the great diffusiveness of their Evidence, have let out certain circumstances which tend to show that, from beginning to end, Sir *John* must have had in his contemplation both the existence of the Will and the existence of the Settlement. It appears, by a Letter which he wrote on the 29th of April 1817, (which was just One Calendar Month and a Day after the execution of his Will) that he was then taking a very active part in the superintendence of the Settlement which Mr. *Powys* was going to make upon his Niece *Julia* : and his Letter of July 1818 is a complete recognition by him of the existence of his Will, and of the heavy Charges that he had thereby made upon the Reversion of the *Swainston* Estate, and of the circumstance that he considered that Will to be a better one than the Will of 1813, because it had called in aid the

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Hadfield Broad Oak Property, in order to alleviate the Charges on the Reversion of the *Swainston* Estate.

It is observable that one of the Witnesses examined for the Defendants, deposes, in her Answer to the Ninth Interrogatory, that she was staying in the house with Sir *John Barrington* when he made his Will in 1813 and previous to the Marriage of his eldest Niece Lady *Simeon*; that he mentioned to the Deponent the circumstance of having made his Will, and said that since he had discovered that he had a Power of disposing of his *Swainston* Estate, he had made his eldest Niece an eldest Son, and had given her younger Sisters 10,000 *l.* a piece, payable on the death of their Father, and that, in order to raise those Portions, he had appropriated the Tithes of some of his *Essex* Property. Another Witness, however, represents, distinctly, that it was some time after the making of the Will of 1813, that the Testator purchased the *Hadfield Broad Oak* Property. This shows the danger of admitting that sort of Evidence which has been given to support the Case on the part of the Defendants. For, supposing the Evidence of this latter Witness to be correct, it is impossible that, in a conversation which took place previous to the Marriage of the eldest Miss *Barrington*, the Testator could have said that, in order to raise the Portions, he had appropriated the Tithes of some of his *Essex* Property. Then the former Witness, in a subsequent part of her Answer to the same Interrogatory, says: "After the Marriage of *Julia Barrington* to the Plaintiff, Sir *John Barrington* mentioned to me, the first time of my going to see him after that event, that he had settled 10,000 *l.* upon his Niece *Julia*, to be payable after the death of her Father; and he repeated the Fund out of

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which this Portion was to be paid, namely, out of the Accumulations of the Tithes ; and Deponent distinctly understood from him that the 10,000 *l.* which he had provided for *Julia* by his Will, and the 10,000 *l.* secured by the Settlement made on her Marriage, were one and the same Sum ;” which I take not to be receivable as Evidence, unless, previously, the fact be established that the Party who made the Declaration, had assumed the character of a Parent, which I think is not the case. But then it is very important that this Witness does represent Sir *John* to have said, after *Julia’s* Marriage, that the 10,000 *l.* provided for her by the Settlement, was to come out of the *Hadfield Broad Oak* Property, which Property was, *by the Will only*, made liable to Pay the 10,000 *l.* The same Witness, in answer to the 20th Interrogatory, says : “ I repeatedly before and, occasionally, after the Marriage of *Julia Barrington* to the Plaintiff, heard Sir *John Barrington* speak of his having left his Property at *Swainston* to his eldest Niece, Lady *Simeon*, and of his having made her an eldest Son, and of his having charged the Portions of 10,000 *l.* a piece to each of the younger Daughters of his Brother, upon the Fund to be formed by the Accumulations of the Tithes in *Essex*, and the deficiency (in case that Fund should be insufficient at his Brother’s death to pay these Portions) upon the *Swainston* Property :” and that Sir *John* said so is confirmed by the Evidence of Mr. *Cocks*, and by what Miss *Jane Elizabeth Barrington* says in her Answer to the 20th Interrogatory : because she says : “ I have heard Sir *John Barrington* declare that he intended to make Lady *Simeon* his Heiress to his *Swainston* Estate, and to give 10,000 *l.* to each of her Sisters, and that he intended the Accumulating Rents of the Tithes in *Essex*, to be ap-

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plied to the payment of the Five Sums of 10,000 *l.* which he meant to give to his Nieces, in order that the *Swainston* Estate might not be burthened or diminished by providing such Sums ; and that it was his wish that the Accumulations should amount to 50,000 *l.* in order that there might be no Charge, in that respect, on the *Swainston* Estate." So that we find Sir *John* repeatedly acknowledging that the Property subjected, *by his Will*, to the charge of the Portions, did remain liable to pay them.

I cannot but think that, in such a Case as this, where it is not established that the Testator had assumed the Parental Character, it is of great importance to take notice that the Testator did, by a Codicil, when both the Will and the Settlement must have been fresh in his memory (because the Codicil of the 23d of June preceded the Letter of the 11th of July 1818) expressly confirm his Will.

In *Roome v. Roome* The Master of the Rolls held, in a Case where he did not think that the Ademption was clear, and decided against it, that a Codicil, which was a republication of the Will, was a confirmation of the Legacy. He says: " It appears too, manifestly, by one circumstance, the Testator did not intend himself there should be any Ademption of the 1,000 *l.*, and that is the Codicil made above a year after the 126 *l.* had been laid out for Apprenticing the Defendant, which is a confirmation of the Legacy and amounts to a republication of the Will."

The Cases on the subject now before me, are very numerous : it is not however necessary to go through

them all; for the result of them is stated, by Lord *Eldon*, in the clearest and most comprehensive language, in the Case of *Trimmer v. Bayne*, where the object of the Gift was a natural Child. Lord *Eldon*, in that Case says: "The Rule is settled that, where a Parent or a Person *in loco Parentis*, gives a Legacy as a Portion, and, afterwards, upon Marriage or any other occasion calling for it, advances in the nature of a Portion to that Child, that will amount to an Ademption of the Gift by the Will; and this Court will presume he meant to satisfy the one by the other. It differs from the performance or satisfaction of a Covenant in this, that the Court overlooks small differences in the circumstances of that which is proposed to be given, and that in satisfaction of which it is contended to be given. The Court does not inquire whether the Portion by the Will, is entirely and absolutely to the Child, or what is afterwards advanced in this form, a Settlement upon Marriage, which, not being a performance of a Covenant or satisfaction of a Debt, yet is a presumed satisfaction of the intended Portion."

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In *Ex parte Pye*, which came before the same learned Judge subsequently to the Case of *Trimmer v. Bayne*, his Lordship says: "I may state, as the unquestionable Doctrine of the Court, that, where a Parent gives a Legacy to a Child, not stating the purpose with reference to which he gives it, the Court understands him as giving a Portion; and, by a sort of artificial Rule, in the application of which legitimate Children have been very harshly treated, upon the artificial notion that the Father is paying a Debt of Nature, and a sort of feeling upon what is called a leaning against double Portions, if the Father afterwards advances a Portion on the

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Marriage of that Child, though of less amount, it is a satisfaction of the whole or in part ; and, in some Cases, it has gone a length, consistent with the principle, but showing the fallacy of much of the reasoning, that the Portion, though much less than the Legacy, has been held a satisfaction, in some instances, upon this ground, that the Father, owing what is called a Debt of Nature, is the Judge of that Provision by which he means to satisfy it ; and though, at the time of making the Will, he thought he could not discharge that Debt with less than 10,000 *l.*, yet, by a change of his circumstances and of his sentiments upon that moral Obligation, it may be satisfied by the advance of a Portion of 5,000 *l.*" And, in a subsequent part of the Judgment, His Lordship says : " It comes to this ; that, where a Father gives a Legacy to a Child, the Legacy, coming from a Father to his Child, must be understood as a Portion, though it is not so described in the Will ; and afterwards advancing a Portion for that Child, though there may be slight circumstances of difference between that Advance and the Portion and a difference in amount, yet the Father will be intended to have the same purpose in each instance ; and the Advance is, therefore, an Ademption of the Legacy ; but a Stranger giving a Legacy, is understood as giving a Bounty, not as paying a Debt : he must, therefore, be proved to mean it as a Portion or Provision either upon the face of the Will, or, if it may be, and it seems that it may, by Evidence applying directly to the Gift proposed by that Will." Lord *Eldon* then says : " Upon the authority of *Powel v. Cleaver*, unless you can show that, at the time of making the Will, the Testator meant to give a Portion, as Parent or as standing *in loco Parentis*, and meant to satisfy that, in the whole or in part, by the subsequent

Advance, the Court is not authorized, by the artificial Rules of Equity, to hold it a satisfaction."

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Some of the Cases have decided that, wherever the Party who has made the Provisions, is a Parent or has assumed the parental character, there slight circumstances of difference between the two Provisions, will not prevent the presumption that the second Provision was intended to be an Ademption of the first: but, where the Party who has given both the Provisions, neither is a Parent, nor has assumed the parental character, the Court will look at the Provisions for the purpose of seeing whether any presumption arises from complete identity of purpose. And, if we look at the two Provisions in the present Case for that purpose, we shall find that they differ, materially, from each other. It is true that both the Sums are the same in amount; but the 10,000 *l.* given by the Settlement, was charged only on the Reversion of the *Swainston* Estate, and might have been never raisable at all; or it might not have become raisable immediately upon the death of the Survivor of Sir *John* and his Brother, but after a long succession of Minorities, which might have endured until so many years had elapsed that the Portion might have been of no use, either to the Parties to the Marriage, or to their Children. And it is also observable that the Provision made by the Settlement, is confined to the Husband who was a Party to the Settlement, and to the younger Children of the then intended Marriage, in case there should be more than one Child: whereas the Provision made by the Will, is extended to any Husband that Miss *Julia* might marry, who might happen to survive her, and to all the Children of every Marriage that she might contract. And, at all events,

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the Provision under the Will, must have been satisfied in part ; because there must have been some Proceeds to arise from the Stock and the *Hadfield Broad Oak* Estate : so that, if the Reversion had never come into possession, still a Fund was forthcoming which (as the Defendants' Evidence proves) Sir *John Barrington* himself contemplated would be sufficient to satisfy the whole of the 50,000 *l.* My Opinion, therefore, is that, in this Case, all presumption of satisfaction arising from identity of purpose, is excluded. And I am confirmed in that Opinion by the Decision in *Brown v. Peck*, which, certainly, was a very strong Case for holding that the Provision by the Will was satisfied. There an *Uncle*, by his Will, had given to his *Niece* Eight Dwelling-houses, with remainders over, and two Legacies of 500*l.* each : and then he made a Settlement on the Marriage of his *Niece*, by which he settled One of those Dwelling-houses, together with Four others and a Sum of 500 *l.*, upon the Husband and Wife, successively, and the Issue of the Marriage : and Lord Keeper *Henley* was of opinion that the Settlement made by the Testator on his *Niece*, was not an Ademption or Satisfaction of the Devises and Bequests made to her by the Will.

Great Judges have entertained different notions as to the propriety of the Rule of this Court, that satisfaction may arise on the presumed intention of the Donor. Lord *Hardwicke*, certainly, did not approve of the Rule. Lord *Thurlow*, in *Debeze v. Mann* and *Powel v. Cleaver*, and Lord *Eldon*, in the Cases of *Trimmer v. Bayne* and *Ex parte Pye*, expressed their disapprobation of it. Lord *Kenyon*, however, and Sir *John Leach*, M. R., as appears from the Five Cases in 2 Russ. & Myl., approved of the Rule : and yet one would have thought

that the circumstance of having Five Cases in succession (a), and of somewhat complicated circumstances, arising all upon the Rule, might have afforded a sort of hint that the Rule tended to raise questions, and, therefore, was not a very convenient one, to say the least of it. My Opinion is, upon the whole view of this Case, that the Defendants have not made out a Case of presumed Satisfaction : and the consequence, therefore, is that Mr. *Powys* and his Child are entitled to have both the Portions raised.

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Evidence tendered on behalf of Sir *Richard* and Lady *Simeon*, was rejected by The *Vice-Chancellor* on the ground that it related to a fact which was not put in Issue by their Answer.

Infant.
Evidence.

Evidence cannot be read, even on behalf of an Infant, as to a fact not stated in the Bill, unless it is put in Issue by his Answer.

Mr. *Bethell*, for the Defendant their Infant Son (who had put in the usual Infant's Answer), contended that the Evidence was admissible on behalf of the *Infant*. But, The *Vice-Chancellor* ruled that Evidence could not be read, even on behalf of an Infant, as to facts not stated in the Bill, unless they were put in Issue by his Answer (b).

(a) The Cases alluded to, are *Weall v. Rice*, 2 Russ. & Myl. 251 ; *Booker v. Allen*, ibid. 270 ; *Carver v. Bowles*, ibid. 301 ; *Lloyd v. Harvey*, ibid. 310 ; *Sheffield v. The Earl of Coventry*, ibid. 317. All these Cases did not occur, in succession although they are so reported.

(b) The Infant came of Age on the 8th of February 1836 ; and, afterwards, moved for leave to put in a new Answer, &c. See a Report of the Motion, *post.* 457.

1834
10th March.

*Attachment.
Practice.*

TAYLOR v. FISHER.

The Defendant's **THIS** was a Town Cause.
Time for An-

swering having expired, the Plaintiff's Clerk in Court gave Notice, on a Saturday, that he must Attach the Defendant at the next Private Seal, which was on Monday following: and, on that day, the Plaintiff sealed an Attachment. On the same day, the Defendant, not knowing that the Attachment had been sealed, applied for an Order for Time, and gave Notice, to the Plaintiff's Clerk in Court, that he had done so. The Attachment was discharged without Costs, as the Defendant had used due diligence in obtaining the Order for Time.

On the 9th of December 1833, the Defendant, who had obtained all the Orders for Time to Answer, filed a Plea to the whole Bill, for want of Parties. On the 11th the Plaintiff submitted to the Plea, and obtained an Order to amend, and amended his Bill accordingly. On the 10th of January 1834, the Defendant obtained an Order for a Month's Time to answer the amended Bill. On Saturday the 8th of February, the Answer not having been filed, the Plaintiff's Clerk in Court gave Notice, in the usual manner, to the Defendant's Clerk in Court, that he must attach the Defendant, for want of Answer, at the first Private Seal, without further Notice. The Plaintiff's Clerk in Court, having received no Notice that the Defendant intended to apply for an Order for Time, sealed an Attachment on Monday the 10th, which was a private Seal-day. On the morning of that day, the Defendant, before he was aware that the Attachment had been sealed, presented a Petition, at the Rolls, for Three Weeks Time, and, at Two o'clock on the same day, gave Notice, to the Plaintiff's Clerk in Court, that he had done so.

The Defendant now moved to set aside the Attachment, for irregularity.

Sir *E. Sugden* and Mr. *Wakefield*, in support of the Motion, said that the Defendant had used due diligence

in obtaining the Order for Time, and, therefore, the Attachment had been issued against good faith, as the effect of the Notice given on the 8th of February, was that no Attachment would be issued if the Defendant used due diligence in obtaining an Order for Time. *Barritt v. Barritt* (a).

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The *Solicitor-General* and Mr. *Sharpe*, for the Plaintiff, said that the Attachment had not been issued sooner than the Notice intimated; and that the Plaintiff, before he issued the Attachment, had no Notice that the Defendant intended to apply for the Order for Time. *Kirkpatrick v. Meers* (b).

The VICE-CHANCELLOR :

The effect of the Clerk in Court's Note was that the Plaintiff would not issue an Attachment if the Defendant used due diligence in obtaining an Order for Time. The day after that on which the Note was handed over, was Sunday. The Defendant applied for the Order for Time on the following day. Due diligence, therefore, was used by him in obtaining the Order.

Discharge the Attachment without Costs.

(a) 3 Swans. 395. (b) *Ante*, Vol. II. page 16.

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HOY
v.

MASTER.

Sir *C. Wetherell* and Mr. *Gordon*, for the Plaintiffs, cited *Reith v. Seymour* (a); *Fisher v. Bank of England* (b); *Nannock v. Horton* (c).

Sir *E. Sugden* and Mr. *W. Lowndes* appeared for the Defendants; but,

The *Vice-Chancellor*, without hearing them, declared that the Two-thirds passed by the Widow's Will.

(a) 4 Russ. 263. (b) 13 Ves. 111, cited. (c) 7 Ves. 391.

VANDIEST v. FYNMORE.

1834:
27th March.*Probate Duty.*

A Testator gave to *A.* a Power to dispose, by her Will, of 5,000 *l.*, part of his Estate, on which Probate Duty was paid. *A.* exercised the Power by her Will: Held that Probate Duty was not again payable in respect of the 5,000 *l.*

GEORGE VANDIEST, by his Will dated the 12th of February 1811, devised the residue of his Property to Trustees, in Trust, out of the Interest, Dividends or Annual Produce thereof, to pay, to *Ann Hart*, an Annuity of 1,000 *l.*, for her separate use for her life; and then proceeded as follows: "I moreover empower the said *Ann Hart* to dispose of and bequeath the Sum of 5,000 *l.*, or any part thereof, out of my Effects, by her Will duly executed, to any Person or Persons, and in such manner, and under such conditions as she shall, by her said Will, think proper: and my said Executors shall, out of my Effects, pay the said Sum, or any part thereof, accordingly, in virtue of such Will."

The Testator died on the 17th of April 1814: and Probate Duty was paid in respect of his Estate.

Holt ~ Bonth
6. in a bel. 756.

Ann Hart died on the 10th of January 1831, having, by her Will, disposed of the 5,000*l.* in pursuance of the Power given to her by the Will of the Testator.

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VANDIEST
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In calculating the Probate Duty payable in respect of her Personal Estate, her Executor considered that no Duty was payable in respect of the 5,000*l.*, and, therefore, her Personal Estate and Effects were sworn under 300*l.*, and Probate Duty was paid thereon accordingly. The Commissioners of Stamps having required the Executor to pay a further Duty in respect of the 5,000*l.* on the authority of *Palmer v. Whitmore* (a), and *The Attorney-General v. Staff* (b), the Executor presented a Petition in this Cause (which was instituted for the administration of the Testatrix's Estate) praying either that a sufficient Portion of the Funds in the Cause might be sold for payment of the additional Probate Duty, or that the Petitioner might be at liberty to defend any Suit, Action, or other Proceeding which might be brought against him for Payment thereof.

Mr. Stuart for the Petitioner.

Mr. Stinton for the Appointees of the 5,000*l.*

The VICE-CHANCELLOR :

The Cases relied on by the Commissioners of Stamps, do not apply ; for, in those Cases, the Powers were created by Deed. Here the Power was given by the Will of the original Testator, and the Appointees take as if they had been named in his Will.

(a) *Ante*, Vol. 5. p. 178. (b) 2 Crompt. & Mee. 124.

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Notwithstanding The Attorney-General does not appear on this Petition, the point is so clear, that I do not think it necessary to send a Case for the Opinion of the Court of Exchequer; but I shall make an Order according to the second alternative of the Prayer.

SWALE v. MILNER.

1834:

9th April.

*Creditor's Suit.
Costs.*

By the Decree on further Directions, in a Creditor's Suit, the Costs of all Parties were directed to be taxed as between Solicitor and Client, and paid out of a Fund in Court. The Fund proving insufficient to pay the Costs, the Defendants, the Heir and Administrator of the Debtor, petitioned to be paid their Costs, in the first instance. But the Court directed the Fund to be divided amongst all the Parties, in proportion to their Costs.

By the Decree on further Directions, it was ordered that the Costs of all Parties should be taxed, as between Solicitor and Client, and paid out of the Sum of 354 *l.* Three per Cents. standing in the name of the Accountant-General in Trust in the Cause. The Costs were taxed accordingly; the Plaintiffs' at 304 *l.*, and the Defendants' at 280 *l.* The Stock was sold and produced 315 *l.* only.

The Defendants presented a Petition stating that the 315 *l.* not being sufficient to pay the whole of the Costs, the Accountant-General was unable to pay such Costs pursuant to the Order, and that he could not pay any part of such Costs without the further Order of the Court: that the Petitioners were advised that they were

*Tapping v. Brown 1 Har. 405
Garnet v. Taylor. 2 Har. 413*

entitled to have their Costs paid out of the 315 *l.*, in the first instance. The Petition prayed that the Costs of the Petitioners might be paid out of the 315 *l.*, and that the residue of that Sum might be paid, to the Plaintiffs, on account of their Costs.

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—
SWALE
v.
MILNER.

Mr. *Barber*, in support of the Petition, relied on *Young v. Everest (a)*.

Sir *E. Sugden* and Mr. *Jacob* appeared for the Plaintiffs.

The VICE-CHANCELLOR :

I cannot grant the Prayer of the Petition. The Order on further Directions, directed the Costs of all Parties to be paid: and I cannot vary that Order. All that I can do is to direct a reference to the *Master* to divide the Fund, amongst all the Parties, in proportion to their Costs.

(a) 1 Russ. & Myl. 426.

MURRAY *v.* LAWFORD, CHITTY AND CUT-
TUMPAUCUM ARNACHELLA MOODILIAR.

1834:
15th April.

Practice.

*Commission to
examine Wit-
nesses.*

Commission to
examine Wit-
nesses at *Ma-
dras*, directed to
the Judges of
the Supreme
Court there.

THE Plaintiff had obtained a Commission, in the usual terms, for the Examination of Witnesses in *Scotland* and at *Madras*. He now moved that a Writ in the nature of a Mandamus or Commission to the Chief Justice and Judges of the Supreme Court of Judicature at *Madras*, for the Examination of Witnesses in the Cause, might be issued, and that the same might be executed, and that such Examination might be re-

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turned pursuant to the Statutes in that behalf made and provided (a).

The Motion was supported by Affidavits made by the Plaintiff and other Persons, stating that the Cause was at issue: that the Plaintiff had then living in *India*, where the subject matter of the Cause arose, several most material Witnesses to examine on his behalf, particularly at *Madras* and within the Presidency of *Madras*, and particularly, as the Plaintiff had been informed and believed, one *Narso Naie*, *William Harris*, &c. &c.: that a very considerable portion of the Evidence necessary to establish his Case, was to be obtained from Witnesses resident in *India*: that, from Advices which he had, within the last few days, received from *India*, he believed that most of his material Witnesses

(a) By 13 Geo. 3. c. 63, s. 44, it is Enacted that when and as often as the *East India Company* or any Person or Persons whatsoever, shall commence and prosecute any Action or Suit in Law or Equity, for which Cause hath arisen or shall hereafter arise in *India*, against any other Person or Persons whatever, in any of His Majesty's Courts at *Westminster*, it shall be lawful for such Courts respectively, upon Motion there to be made, to provide and award such Writ or Writs, in the nature of a Mandamus or Commission, to the Chief Justice and Judges of the Supreme Court of Judicature at *Fortwilliam* or the Judges of the Mayor's Court at *Madras*, *Bombay*, or *Bencoolen*, as the Case may require, for the Examination of Witnesses; and that such Examination being duly returned, shall be allowed and read, and shall be deemed good and competent Evidence at any Trial or Hearing between the Parties in such Cause or Action, in the same manner, in all respects, as if the several directions thereinbefore prescribed and enacted in that behalf, were again repeated. By 37 Geo. 3, c. 142, s. 11, the powers &c. of the Mayor's Court at *Madras*, were transferred to the Recorder's Court; and, by 39 & 40 Geo. 3, c. 79, s. 5, to the Supreme Court of Judicature at *Madras*. The above was the first application for a Commission that was made under any of the Acts referred to.

would refuse to appear to be examined before the Commissioners already appointed under the Order of the Court for that purpose, unless compelled so to do, in consequence of The *East India Company* being interested, in the event of the Cause, adversely to the Plaintiff: that, as he had been informed and believed, the Commissioners already appointed would have no power of compelling Witnesses to attend to be examined under the said Commission, or to order the production of any Documents on the execution thereof; and he believed that, unless a Commission were issued to the Chief Justice and Judges of the Supreme Court at *Madras* for the Examination of his Witnesses there, in pursuance of the Act of Parliament in that case made and provided, he should be unable to obtain the Evidence of his Witnesses or the production of Documents in *India* necessary for the establishment of his Case: and that he was advised and believed that he could not safely proceed to a hearing of his Cause, without the Testimony of the Witnesses before named.

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Sir *E. Sugden* and Mr. *Williams* for the Plaintiff.

Mr. *Knight* and Mr. *Lloyd* for the Defendants, said the Plaintiff had already obtained an Order for a Commission to examine Witnesses in *India*, and that, if the Motion were granted, the Order, so far as it related to that Commission, must be discharged.

The *Vice-Chancellor* discharged so much of the previous Order as directed Commissions to issue for the Examination of Witnesses in *India*, and ordered that a Writ in the nature of a Mandamus or Commission to the Chief Justice and Judges of the Supreme Court of Judicature at *Madras*, for the Examination of Witnesses in

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the Cause, should be issued, and that the same should be executed and such Examination be returned according to the Statutes in that behalf made and provided: that Publication should be enlarged until the return of the Commission: and that the Costs of the Application should be Costs in the Cause.

1834:

18th & 19th
April.*Deed.**Fraud.**Inadequacy of
Consideration.*

A Wife, who had been deserted by her Husband, became entitled to a Share of an Intestate's Property, amounting to 3,609 *l.* The Husband, whilst he was ignorant of the Amount of the Share, assigned it in Trust for his Wife and Children,

subject to the payment of 10 *s.* a week, to himself for his life. Although the Deed recited that the Intestate's Estate was very considerable, yet, as the Administrators, who were the Wife's Brothers and Parties to the Transaction, did not disclose to the Husband the Amount of the Share, the Deed was set aside.

GROVES v. PERKINS.

GROVES v. CLARKE.

IN 1787 the Plaintiff *William Groves* married *Sarah Perkins*. There was Issue of the Marriage Two Daughters, namely, *Mary*, who afterwards married *Thomas Salter*, and *Eliza*, who afterwards married *John Clarke*. In 1792, the Plaintiff deserted his Wife and Children, and cohabited with another Woman; and he had ever since lived separate from them, without contributing, in any manner, to their support. The Plaintiff was a man of low and irregular habits, and had been, for some years, principally supported by his Brother and his Family, for whom he worked, and who, as one of the Witnesses deposed, treated him more like a Servant than as one of the Family.

In August 1824 *Elizabeth Porteus*, a Sister of Mrs. *Groves*, died Intestate, leaving *James Perkins*, *Samuel Perkins*, *Margaret Perkins* and Mrs. *Groves*,

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v.
PERKINS.

her Brothers and Sisters, her Next of Kin. *James* and *Samuel Perkins* took out Administration to the Intestate. *Mrs. Groves's* Share of the Intestate's Property amounted to 3,609*l.* In January 1827, *Samuel Groves*, the Plaintiff's Brother, wrote a Letter to *Mrs. Salter*, which, after stating the Plaintiff to be in very indigent circumstances, concluded as follows: "Your Father has been informed (how correctly I cannot say) that he can claim your Mother's Share of the late *Mrs. Porteus's* Property. His relations, generally, would decline assisting him in such a Claim, conscious that he is not a fit Person to possess a large Sum of Money, and that it would be more reasonable that he should receive a regular and voluntary Allowance from his Children. But, if something should not be contributed voluntarily, he may be driven to some course (supposing the Statement correct) which may be annoying: and I now make the following Suggestion: that you, or some of your Family, shall agree to give your Father a weekly Sum, during his life; and myself, Sons and Relations, by whom he has been, as yet, in some degree assisted, will use whatever influence we possess to cause him to do what may be proper to release your Family from any future Claims on his part." Shortly after the date of this Letter, it was arranged (as the Answers alleged) between *Samuel Groves*, on behalf of the Plaintiff, and *James* and *Samuel Perkins*, on behalf of *Mrs. Groves*, that 10*s.* a week should be paid to the Plaintiff, during his life, out of *Mrs. Groves's* Share of *Mrs. Porteus's* Estate, and that the Residue, and all other Property to which *Mrs. Groves* might, at any time, become entitled, should be assigned, for the benefit of herself and her Daughters, in the manner after mentioned; and that *James* and *Samuel Perkins* should procure a proper Deed to be prepared

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for carrying the arrangement into effect. *James Perkins* gave instructions for the Deed to his Solicitor; and a Draft was prepared and sent to him for the purpose of being explained to the Parties interested: and, on the 27th of October 1827, the Plaintiff, accompanied by one *Jones*, a Grocer, attended at the Solicitor's Office, and the Deed was then read over and explained to them, and the Plaintiff executed it. The Plaintiff, however, had no professional Adviser, nor was he informed of the Amount of his Wife's Share of the Intestate's Property.

The Deed was dated the 27th of October 1827; and, after reciting the Marriage of the Plaintiff and his Wife, and that there was Issue of the Marriage two Daughters; and that, in October 1792, the Plaintiff left his Family, and had since continued to live separate from them, and that his Wife had, since her separation from her Husband, maintained herself and her Children without receiving any Assistance from her Husband; that *Mrs. Porteus* died in August 1824, Intestate, being, at her death, possessed of very considerable Personal Estate, leaving *Mrs. Groves, James Perkins, Samuel Perkins* and *Margaret Perkins* her Next of Kin, and, as such, entitled to her Personal Estate; that, on the 25th of October 1824, Letters of Administration to the Intestate were granted to *James* and *Samuel Perkins* by the Prerogative Court of *Canterbury* and the Consistory Court of *Chester*; that the Plaintiff had proposed, and his Wife had agreed that his Wife's distributive Share of the Intestate's Personal Estate and Effects, and all other the Personal Estate, Monies and Effects of or to which the Plaintiff and his Wife, in her Right, were possessed or entitled, should be assigned to *Price Williams* and

Margaret Perkins, upon the Trusts after declared, and that all the Personal Estate and Effects which should thereafter belong or come to *Mrs. Groves*, or to the Plaintiff in her Right, should be settled upon the same Trusts : It was witnessed that the Plaintiff and his Wife did Assign, to the Trustees, the before-mentioned Share of the Intestate's Estate, and all other the Personal Estate, Monies and Effects of or to which the Plaintiff and his Wife in her Right, or the Plaintiff in the same Right, were or was possessed or entitled, in Trust to lay out the same upon the Securities therein-mentioned, and, out of the Interest and Dividends, to pay to the Plaintiff, for his Life, the weekly Sum of 10 s., and, subject thereto, to stand possessed of the Trust Premises in Trust for such Persons as *Mrs. Groves* should, by Deed or Will, appoint, and, in default of such Appointment, in Trust for the separate Use of *Mrs. Groves*, for her life, and, after her decease, in Trust for *Mrs. Salter* and *Mrs. Clarke* their Executors, &c., equally, as Tenants in Common.

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The Bill was filed in February 1832, against *James* and *Samuel Perkins*, the Trustees of the Deed, and *Mrs. Groves* and her Children, alleging that the Deed had not been perused by any Solicitor on the Plaintiff's behalf, that it had been executed by him for a grossly inadequate Consideration, and when he was in distressed circumstances and ignorant of the amount of his Wife's Share of the Intestate's Property, which he had only lately discovered, and that his execution was procured by the fraud and imposition of the Defendants; and praying a Declaration to that effect and that the Deed was executed by him whilst he was ignorant of

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the amount of his Interest in the Intestate's Estate and for an inadequate Consideration ; and that the Deed might be delivered up and cancelled, and that his Wife's Share might be paid to him, he being willing to settle upon her such Portion of it as to the Court should seem just.

The *Solicitor-General** and Mr. *Spence*, for the Plaintiff:

The Deed was prepared by the Solicitor of *James Perkins*, who was Mrs. *Groves*'s Brother ; and he gave the Instructions for it ; therefore, the proposal could not be said to have come from the Plaintiff, as the deed recites. The Plaintiff, when he executed the Deed, was in distressed circumstances and utterly ignorant of his Rights. It appears, by *Jones*'s Evidence, that he was asked to accompany the Plaintiff to the Solicitor's Office, for the purpose, merely, of seeing that the 10 s. a week were secured to the Plaintiff. Nothing was said as to whether the Arrangement was a provident one or not, on the Plaintiff's part, nor was he then informed of his Rights or of the amount of his Wife's Share. In *Gordon v. Gordon* (a) Lord *Eldon* says : " I lay out of the Case the question of Consideration ; and I think myself justified, by the authority of *Cann v. Cann* and other Decisions, in holding that, if a dispute arises relative to the legitimacy of Children ; and the members of the Family, to maintain their character in the world, arrange their Rights among themselves, if the matter is

(a) 3 Swans. 400, see 477. See also *ibid.* 73.

* Sir C. *Pepys*.

fully before them, their Agreement will not be disturbed because it is founded on a supposition which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate; but then there must not only be good faith and honest intention, but full disclosure; and, without full disclosure, honest intention is not sufficient."

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Sir *E. Sugden* and Mr. *Sharpe*, for the Defendants :

The Deed recites that the Plaintiff had deserted his Wife and Family; that Mrs. *Porteus* died *possessed of very considerable Personal Estate*, and leaving the Plaintiff's Wife and Three other Persons her Next of Kin; and *that the Plaintiff had proposed* and his Wife had agreed that her Share of Mrs. *Porteus's* Estate should be assigned to the Trustees on the Trusts of the Deed. It appears also, by the Letter which *Samuel Groves* wrote to Mrs. *Salter*, that the proposal for the Arrangement came from his own Family. The Evidence shows that the Plaintiff was a Person of dissolute habits and not fit to be trusted with Money, and that he was treated, by his Brother and his Family, more as a Servant than as an Equal. No Evidence has been given to show that there was any concealment or misrepresentation on the part of the Defendants, or that the Plaintiff was ignorant of his Rights. As the Deed states that Mrs. *Porteus's* Property was very considerable, the Plaintiff was bound to inquire what was the amount of it. *Lord Braybrooke v. Inskip (b)*.

The Rule of this Court is that, if a man abandons

(b) 8 Ves. 417, see 431.

Q Q 3

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his Wife, he is not entitled to any Interest in her Property. *Watkyns v. Watkyns* (c); *Wright v. Morley* (d); *Elliott v. Cordell* (e); *Aguilar v. Aguilar* (f). As the Plaintiff owed a high moral obligation to his Wife and Family, whom he had abandoned, there was nothing to prevent his making a Settlement of his own Property, and much less of his Wife's, on her and his Children. If a Woman, on her second Marriage, makes a Settlement on the Children by her first Marriage, it is settled that it is a transaction that cannot be impeached even by a Purchaser for valuable Consideration. Although this Court will not enforce an Agreement without Consideration, yet it will enforce an Agreement in favour of a Wife and Children. Here, however, the Contract is not *in fieri*, but has been actually completed; and, if there had not been any Pecuniary Consideration whatever for the Settlement, it would have been unimpeachable. The Transaction was never pretended to be a Purchase: the 10*s.* a week were reserved out of the Fund; and, if the Plaintiff had released every shilling of the Property, it would have been a Transaction which this Court must have upheld.

The VICE-CHANCELLOR:

The Plaintiff married the Defendant *Sarah Groves* in 1787. In 1792 he deserted her and her Children, and never afterwards contributed to their support. Mrs. *Groves*, as appears by the Evidence, has lived with and been supported by her Brothers ever since her separation from her Husband, and her conduct has been

(c) 2 Atk. 96. (d) 11 Ves. 12. (e) 5 Madd. 149.
(f) *Ibid.* 414, see 1 Roper on Hus. and Wife, 277.

irreproachable. In 1824 Mrs. *Porteus* died Intestate, leaving Mrs. *Groves* and James, Samuel and Margaret *Perkins*, her Brothers and Sisters, her Next of Kin ; and the two Brothers administered to their deceased Sister. In October 1827 a Deed was executed which the Bill seeks to set aside. That Deed recites &c. [His Honor here stated the Recitals of the Deed, and the Allegations in the Bill.] This is the Case of Fraud made by the Bill ; but there is no Evidence whatever in support of it. The Consideration, however, for which the Plaintiff executed the Deed, is very small ; and the question is whether, adverting to the nature of the Transaction, there was that disclosure made to the Plaintiff which he was entitled to have. The Administrators do not allege, in their Answer, that they stated to the Plaintiff what was the amount of the Intestate's Property or of his Wife's Share of it ; nor is there any Evidence to that effect. The Deed, it is true, recites that Mrs. *Porteus* was, at her death, possessed of very considerable Personal Estate ; but I do not think that that was a sufficient disclosure. And, though there was not that Fraud in the Transaction which the Plaintiff has charged, yet, as the Administrators withheld from him the knowledge of the amount of his Wife's Share, there was that non-disclosure of a material fact which compels me to say that the Deed cannot stand. As, however, the Plaintiff has charged the Defendants with a Fraud which they never practised, I shall set aside the Deed without Costs. Mrs. *Groves* and her Daughters must have their Costs out of the Fund ; and it must be referred to The *Master* to approve of a proper Settlement.

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*Decree.
Parent and
Child.*

In a Suit by a Husband against his Wife and Children, (whom he had deserted), respecting the Wife's Share in an Intestate's Estate, the Decree referred it to The Master to approve of a proper Settlement on the Wife, with liberty to all Parties to lay Proposals before The Master.

Before the Report was made, the Wife died. Held that the Children were entitled to the benefit of the Decree.

The Decree, as drawn up, referred it to The Master to approve of a proper Settlement on Mrs. Groves, (without mentioning her Children), and any of the Parties were to be at liberty to lay proposals before The Master for such Settlement. Mrs. Groves died before The Master's Report was made. The Plaintiff took out Administration to her, and afterwards filed a Supplemental Bill against his Children, claiming the whole of his late Wife's Share of the Intestate's Property.

The Supplemental Suit was heard before The M. R. on the 18th of April 1836, when His Lordship declared that the Children were entitled to the benefit of the Decree, and referred it to The Master to approve of a Settlement.

Mr. Spence and Mr. Dixon for the Plaintiffs.

Mr. Pemberton and Mr. Sharpe for the Defendants.

DAVIES v. GOODHEW.

1834 :
19th and 23d
April.

Conversion.

BY the Settlement made on the Marriage of the Rev. *Edward Davies* with *Katherine Farr*, the Grandfather and Grandmother of the Plaintiff, dated the 2d of December 1788, *Edward Davies* covenanted that, immediately on the solemnization of the Marriage, he would pay to Trustees, 1,200 l. upon Trust, so soon as conveniently might be, *with the joint approbation and consent of himself and Katherine Farr, and not without*, to lay out the same in the purchase of Lands, Tenements or Hereditaments in Fee Simple, or for some long Term or Terms of Years absolute or determinable on lives, or of Copyhold or Customary Lands of Inheritance in possession in Great Britain, and to settle the same in such manner as to enure to the use of or in Trust for himself and his Assigns, during his life, without Impeachment of Waste, and, after his death, to the use of or in Trust for *Katherine Farr* and her Assigns, during her life, for her Jointure and in bar of Dower, and, from and after their several deceases, then to the use of or in Trust for such one or more of the Children or Issue of the Marriage, for such Estate and in such manner as *Edward Davies* and *Katherine Farr*, during their joint lives, and, after the decease of either of them, as the sur-

By a Marriage Settlement, the Husband covenanted to Pay, to the Trustees, 1,200 l. in Trust, *with the consent of the Husband and Wife and not without*, to lay it out in the purchase of Lands in Fee, or for long Terms of Years, or of Copyhold or Customary Tenure, and to settle the same on the Husband for life, without Impeachment of Waste : remainder to the Wife, for life, in bar of Dower, remainder to the use of the Children of the

Marriage as the Husband and Wife or the survivor of them should appoint, and, in default of Appointment, to the Use of all the Children of the Marriage in Tail. The 1,200 l. was invested in the Funds, and so remained, with the acquiescence of the Husband and Wife. There was one Child of the Marriage. The Wife survived her Husband and afterwards died. Held that the Fund ought to be considered as Personal Estate.

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vivor should, in manner therein mentioned, appoint, and, in default of such Appointment, to the use of or in Trust for all and every the Child and Children of the said *Edward Davies* and *Katherine Farr* to be begotten, share and share alike, as Tenants in Common, and of the several and respective Heirs of the body and bodies of all and every such Children, and, in default of such Issue, as to one Moiety, to the use of *Edward Davies*, his Heirs, Executors or Administrators, and, as to the other Moiety, to the use of *Katherine Farr*, her Heirs, Executors or Administrators. And it was provided that, until the 1,200 *l.* should be laid out in the purchase of such Lands, Tenements and Hereditaments as aforesaid, it should be lawful for the Trustees to lay out the same, or such part thereof as should be undisposed of, in their names, in some one or more of the Public Stocks or Funds, or to lend or place out the same at Interest, on such Security, either Real or Personal, as they, with the consent of *Edward Davies* and *Katherine Farr*, should approve of, with power to vary such Investment: and it was declared that the yearly Dividends, Interest Produce of the Securities should be paid to and received by such Persons as and to whom the Rents and Profits of the Premises so to be purchased as aforesaid, should belong by virtue of the limitations aforesaid.

The 1,200 *l.* was paid to the Trustees, and was invested by them in the purchase of 1,250 *l.* Four per Cents. *Edward Davies*, the Plaintiff's Father, was the only Issue of the Marriage. *Edward Davies*, the Grandfather, died in 1812, leaving his Wife *Katherine Davies* and the Plaintiff's Father him surviving, but without having concurred with his Wife in making any appointment of the Trust-Fund,

One of the Trustees having died, the Fund was transferred into the names of the surviving Trustee, and of *Katherine Davies* and the Plaintiff's Father. The Plaintiff's Father died, in 1831, Intestate, leaving the Plaintiff and his Sister, both of whom were Infants, his only Next of Kin. *Katherine Davies* died in August 1832, without having made any appointment of the Fund. The surviving Trustee having died in the lifetime of *Katherine Davies*, the Fund was, after her death, transferred into the names of her Executors.

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The Bill was filed against the Widow and Administratrix of the Plaintiff's Father, the Executors of *Katherine Davies* and the Plaintiff's Sister, submitting that the Fund ought, under the Trusts of the Settlement, to be considered as Real Estate, and that the Plaintiff was entitled thereto as the Heir of the body of his Father; and praying that the Plaintiff might be declared entitled thereto, or to the Lands to be purchased with the Produce thereof, as Tenant in Tail, in case the Court should think proper to direct such Purchase to be made: or, if the Court should be of opinion that the Fund ought not to be considered as Real Estate under the Trusts of the Settlement, then that the Rights of the Parties interested therein might be declared, and that the Executors of *Katherine Davies* might be decreed to transfer the same accordingly, and that the Plaintiff's Share might be secured for his benefit.

The *Solicitor-General** and Mr. Wood for the Plaintiff, said that it appeared, from the Trusts and Provisions of the Settlement, that the leading object of the

* Sir C. Pepys.

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Parties was that the 1,200 *l.* should be laid out in the purchase of Real Estate; and that, as the discretion given by the Settlement had not been exercised by the Parties to whom it was given, the Court ought to exercise it. *Johnson v. Arnold* (a); *Cowley v. Hartstonge* (b).

Sir E. Sugden, Mr. Knight, Mr. Burge and Mr. Heberden for the Defendants :

The Cases cited do not apply. It was quite clear, in those Cases, that the Testator's intention was that the Funds should be laid out in the purchase of Lands of Inheritance. Here the Fund was, originally, Money; and there is nothing to be found in the Settlement that stamps it with a new character. It was to be laid out with the joint consent and approbation of *Edward Davies* and *Katherine Farr*, and not otherwise, in the purchase, not of Lands of Inheritance solely, but for long Terms of Years, or of Copyhold or Customary Tenure; so that the Court cannot say whether it ought to be considered as Freehold, Copyhold or Leasehold Estate. The Fund was and is, and might have never ceased to be Personal Estate. In *Walker v. Denne* (c) the very point was decided; for there The Lord Chancellor says: "But I believe, in every Case of that kind, all of which are very accurately and fully collected in Mr. *Hargrave's* argument in *Pulteney v. Lord Darlington*, it is a necessary circumstance that, where it is by Will, the Will, and, where by Contract, the Deed must decisively and definitively fix upon Money the quality of Land. That is not the present Case; for the Testator has left it perfectly at large, whether, in the conversion of the Property, it should be

(a) 2 Vez. 169.

(b) 4 Dow. 361.

(c) 2 Ves. jun. 170, see 184.

converted into Inheritable Property, or that species of Landed Property that would be distributable as Personal." *Van v. Barnett* (d).

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The VICE-CHANCELLOR :

Although this Cause has been heard as a short Cause, I shall not decide it without further consideration.

The *Vice-Chancellor*, after stating the Trusts and Provisions of the Settlement, said : The Husband and Wife never having consented to the Fund being laid out in the purchase of Lands, the question is whether it is to be considered as Personal Estate, or as being impressed with the character of Real Estate.

23d April.

When the Cause was heard, several Cases were cited, and others exist ; but it would be useless to state them at length, as they all admit that whatever a Fund naturally is, it must so remain, unless the Persons who have dominion over it impress upon it a different character. In *Johnson v. Arnold*, Lord *Hardwicke* thought that it was the intention of the Testator that the quality of Real Estate should be impressed on the Money, and, therefore, he decided that it must be taken as Real Estate. In *Cowley v. Hartstonge*, The House of Lords decided that the Money was to be considered as Real Estate, because it was evident that the Testator intended that, at some time or other, it should be invested in Land ; and that the discretion given to the Trustees to lay it out at Interest, was intended merely to enable them to lay it out, until it could be conveniently in-

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vested in Land. And, in every other Case in which the question has been whether the Property which was the subject of the Suit, ought to be considered as Real or as Personal Estate, the Court has ascertained the intention of the Parties on that point, and has decided accordingly.

This Case is free from all doubt ; because the Parties to the Settlement have declared that the 1,200*l.* should be laid out, *with the joint approbation and consent of the Husband and Wife, and not without*, in the purchase of Lands in Fee Simple, or for some long Term or Terms of Years absolute or determinable on lives, or of Copyhold or Customary Lands of Inheritance. Therefore, if the Fund had ceased to be Money, the Court could not know whether it ought to be taken as Land of Inheritance or as Leasehold, or, if taken as Land of Inheritance, whether it ought to go in one mode of descent or another.

I am of Opinion that, in this Case, there was no conversion, and therefore the Land remains what it was.

FAZAKERLEY v. GILLIBRAND.

BY the Settlement on the Marriage of *Thomas Gillibrand*, Esq. with *Marcella* his Wife, dated in August 1801, the Moiety of the Manor of *Chorley* and of all the other Hereditaments of or to which *Thomas Gillibrand* was seised or entitled for an Estate of Freehold or Inheritance, situate in *Chorley*, *Adlington*, *Blackrod*, or elsewhere in the County of *Lancaster*, under the Will of *William Gillibrand* deceased, was limited to the Use of *Thomas Gillibrand* for life, with remainder to Trustees to preserve &c., with remainder (subject to a Rent-charge of 500 l., for the Jointure of *Marcella Gillibrand*) to certain other Trustees, for 500 Years to be computed from the decease of *Thomas Gillibrand*, with re-

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29th April.

*Double Por-
tions.
Satisfaction.*

By a Marriage Settlement, a Term of Years was created for raising Portions for younger Children, which were to vest at the usual periods, but were not to be paid till after

the Father's death. And there were the usual Clauses for Survivorship and Maintenance, and also a Proviso that any advance of Money, made by the Father in his lifetime, to the Children, should be a Satisfaction, *pro tanto*, of their Portions, unless the Father should, in writing, direct the contrary. The Father devised all his Real Estates not in Settlement, to Trustees in Trust to sell and pay his Debts &c., and to pay the Surplus equally amongst *all* his Children (except his eldest Son) at the usual times; and, if any of them died under 21 leaving Issue, their Shares were to go to their Issue, but if they left no Issue, then to the Survivors; and the Will contained a Clause for the Advancement of the Children, but was silent with respect to the Provision being a Satisfaction of the Portions. The eldest Son filed a Bill insisting that the Provision by the Will, was intended to be a Satisfaction of the Portions. Some of the younger Children demurred. The Court was of opinion that the Provision by the Will, although it was to arise from the Sale of Lands, and although the Will contained no Declaration on the subject, might be a Satisfaction of the Portions. But the Demurrer was overruled, as it could not appear, until the Hearing, whether there would be any Fund that might be a Satisfaction.

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mainders to the first and other Sons of the Marriage, successively, in Tail-male.

The Trusts of the Term were for securing the Rent-charge, and, subject thereto, in case there should be one or more Children of the Marriage other than an eldest or only Son, to raise, after the decease of *Thomas Gillibrand*, or in his lifetime if he should so direct, the Sums of 6,000 *l.* 8,000 *l.*, and 10,000 *l.* for the Portions of one, two, three or more such Children respectively, which were to be vested and transmissible Interests in Sons, at 21, and in Daughters, at that age or on their Marriage, and to be then paid to them, if *Thomas Gillibrand* should be then dead, but if not, then immediately after his decease: And, if any of the younger Sons should die or become an eldest or only Son under 21, or if any of the Daughters should die under that age and unmarried, then their Portions, as well original as accrued, were to go to the Survivors or others of such Children, and to become vested in and be paid to them at the ages and times aforesaid, but no such one, two, three or more Children were to be entitled to more than 6,000 *l.*, 8,000 *l.*, and 10,000 *l.* respectively.

And the Trustees were empowered, after the decease of *Thomas Gillibrand*, or in his lifetime, if he should so direct, to raise and apply a Moiety of the Portions for the advancement of the Children; and also to raise, out of the Rents of the Settled Estates, for the Maintenance and Education of each of the younger Children, such yearly Sum as *Thomas Gillibrand* should, in his lifetime, direct, not exceeding the Interest at Four per Cent. of each Child's Portion, and, in default of such direction, then such Yearly Sum, not exceeding such Interest,

as the Trustees should think fit; the said Yearly Sums for Maintenance, to be free from all deductions, and to be raised and paid by four equal Quarterly Payments: and the Trustees were not to Mortgage, Sell or Demise any part of the Estates comprised in the Term, until some one of the Portions should become payable.

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It was then provided that, if *Thomas Gillibrand* should, in his lifetime, give or advance to or with any Child or Children for whom a Portion or Portions was or were intended to be thereby provided, any Sum or Sums of Money, for or towards his or her preferment or advancement in the world, then unless *Thomas Gillibrand* should, by some writing under his hand, direct the contrary, if such advanced Sum or Sums should be equal to the whole of the Portion or Portions of such Child or Children, the same should be accounted to be in full Satisfaction of his, her, or their Portion or Portions; but, if such advanced Sum or Sums should be less than such Portion or Portions, then the same should be considered as part only of his, her or their Portion or Portions, and so much Money only should be raised, under the Trusts of the Term, for the Portion or Portions of the Child or Children so advanced, as, with the Sum or Sums so to be advanced, would complete the Sum intended to be thereby provided for such Child or Children: and the Term was to cease when the Trusts were satisfied.

There was Issue of the Marriage, *William Gillibrand*, and the Plaintiff, who afterwards took the name of *Fazakerley*, and seven other Children, five of whom had attained 21. *William Gillibrand* died in his Father's lifetime, and thereupon the Plaintiff became the eldest Son of the Marriage.

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Thomas Gillibrand, who was seised of other Estates besides those comprised in the Settlement, made his Will dated the 17th of December 1825, and thereby, after directing all his just Debts and Funeral and Testamentary Expenses to be paid out of his Personal Estate except such parts thereof as he might thereafter bequeath as Heir-looms, and charging his Real Estates with the payment of the deficiency, directed his Executors to allow his Wife, *Marcella*, the Use of all his Plate, and of his Library or Bookcase, and also all his Books, for her life, and, after her decease, he directed the same, as also all Family Pictures to be considered and to pass, *as in the nature of Heir-looms*, to the eldest Son of his Family, and so to pass on, from time to time, to the Head of his Family being Owners of his Mansion-house called *Gillibrand Hall*; and he bequeathed all his Household Goods and Furniture, Monies, Securities for Money, Goods, Chattels, Carriages, Horses and Personal Estate and Effects, of whatsoever nature or kind the same might be, and of which he should die possessed or entitled unto (except such part thereof as might be considered Heir-looms) unto his Wife, her Executors, &c. And he gave all and every his Messuages, Tenements, Lands, Hereditaments, Ground-rents, and all and every his real Estate, were the same Freehold, Copyhold, Leasehold or Customary, or of whatever tenure the same might be, and wherever the same might be situate, and all his Estate and Interest therein, *and which might not be subject to Settlement*, or of which he had the power of disposing, unto certain Trustees, their Heirs, Executors, Administrators and Assigns, upon Trust, *after the expiration of six calendar Months next after his decease*, to sell the

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same. And he directed the Trustees to stand possessed of the Monies to arise from such Sale, in Trust to discharge, in the first place, the remainder of such of his Debts, Funeral and Testamentary Expenses as his Personal Estate (except as aforesaid) should not be sufficient to pay, and then to pay the Trust Monies equally amongst all his Children then born or which might thereafter be born (except his eldest Son, or such of his Son or Sons as might be the Owner or Owners either of the *Gillibrand* or *Fazakerley* Estates) equally amongst them, such of them as might be Sons to be entitled to their respective Shares at their ages of 21, and such of them as might be Daughters, at their ages of 21 years, or on their Marriage; and, in case of the death of any of his Children before attaining 21 leaving lawful Issue, he directed his Trustees to pay the Shares of such Children equally amongst their Issue; and, in case of the death of any of his Children under 21 and without leaving any lawful Issue, then he directed his Trustees to pay their Shares equally amongst his surviving Children (except as aforesaid) and the Issue of such of them as then might be dead leaving Issue, such Issue to take as aforesaid. And he authorized his Trustees (if they should think fit) to advance the whole, or any part of the expectant or presumptive Shares of his said Children, to them, or to any other Person or Persons, for their Advancement, in such manner as his Trustees should deem advisable, although the Portions of such Children should not then have become payable or vested: and he appointed the Trustees Executors of his Will.

The Testator made a Codocil, duly executed and attested, bearing date the 22d of November 1827; and, thereby, after reciting that he was Lord of the Manor of

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Chorley and was Owner of certain Coal Mines and other Mines and Minerals in *Chorley* aforesaid, and supposing that the general devise in his Will of all his Messuages, Lands, &c. might not be sufficient to pass the said Manor, Coal Mines, and other Property which he might die possessed of and entitled unto, and to remove any doubts that might arise in respect thereof, he gave and devised his said Manor of *Chorley* and Moiety or Moieties and Parts and Shares of the said Manor, and also all Coal Mines, and other Mines and Minerals of every description, which he was possessed of or entitled unto, and wherever the same might be situate, *and which were not in Settlement, and of which he had the power of disposing*, to the Trustees named in his Will, their Heirs, Executors, &c., upon and for the same Trusts intents and purposes, and for the benefit of the same Persons, and in the same manner as he had, by his Will, given all his Messuages, Lands, &c., and subject to the same several Clauses, Provisoos and Agreements as were mentioned in his Will; which he thereby confirmed in every respect.

The Testator died in December 1828, leaving *Marcella Gillibrand*, his Widow, and the Plaintiff, his eldest Son, and seven other Children him surviving. The Trustees and Executors having disclaimed and renounced, the Widow and the Rev. *Richard Thompson* were appointed Trustees in their place, and the Widow took out Letters of Administration to the Testator with his Will and Codicil annexed.

The Bill, which was filed in March 1834, against the Trustees of the Will, Sir *George Goold* the surviving Trustee of the Term of 500 Years, and the younger

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Children of the Marriage, alleged that the younger Children claimed to be entitled to the Proceeds of the Real Estates devised by the Will, and also to their Portions under the Settlement; but the Plaintiff charged that the former were intended to be in Satisfaction or Substitution, or, at least, in part Satisfaction or Substitution for the latter, and that the younger Children were bound to elect to take, either under the Settlement or under the Will: that, in February 1832, the younger Children filed their Bill * against Sir *George Gould* and the Plaintiff in this Suit, stating the Settlement, but taking no notice of the Will and Codicil, and praying that the Trusts of the Settlement relative to the Portions, might be carried into execution: that the Plaintiff was advised that the only question in that Suit, was whether he should be justified in paying the Portions of such of the younger Children as were then Infants, to Sir *George Gould*, but the Plaintiff was not apprized of any Question as to the Satisfaction of the Portions provided by the Settlement by the Portions given by the Will and Codicil, and, therefore, no such Question was raised by his Answer.

The Bill then set forth the Decree in *Gillibrand v. Gould*, and charged that the younger Children, or, at least, such of them as were adult, had, by filing the Bill and taking the Decree in that Cause, elected to take under the Settlement and to give up, for the Plaintiff's benefit, the Portions provided for them by the Will and Codicil, or, if the Court should be of opinion that they or any of them were not bound by such election, that they ought to make their election then, or, at least,

* See *Gillibrand v. Gould*, ante, Vol. 5, page 149.

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after the clear amount of the Portions given to them by the Will and Codicil, should have been ascertained, and that they ought to be declared to be entitled to one Portion only; and that they ought not to be permitted to enforce the Decree in the original Suit, until a Decree had been obtained in the present Suit.

The Bill prayed that it might be declared that the younger Children were not entitled to the Portions under the Settlement and also to the Portions under the Will and Codicil; and that it might be declared that they had elected to take the former and that the Plaintiff was entitled to the latter, or that the younger Children, or such of them as should be held not to have elected, might be ordered to elect; and that the Plaintiff might be declared to be entitled to such of the Portions as they should not have elected, or should not elect to take; and that the Will might be established and the Trusts thereof performed; and that the Real Estates which passed by the Will and Codicil might be sold, and that the clear Residue of the Proceeds thereof, after paying such of the Testator's Debts as were properly charged thereon, might be ascertained.

The Testator's Widow, *Sir George Goold*, and three of the younger Children who were adult, demurred, generally, to the Bill.

Sir E. Sugden and *Mr. Parry*, in support of the Demurrer:

In the Will and Codicil the Testator shows the greatest anxiety to dispose of everything that he could dispose of. Having sufficiently provided for his eldest Son by his Settlement, he meant, by his Will, to give

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everything that he could dispose of, for the benefit of his younger Children. By his Will he directs that certain Articles shall be considered as Heir-looms, and he devises all his Lands which might not be subject to Settlement. So that, when he made his Will, he had his Settlement in view ; and, consequently he could not intend that what he gave by his Will, should be a Satisfaction of the Provision under the Settlement. The Provision by the Will, is for all the Testator's younger Children ; the Provision by the Settlement is for the younger Children of the Marriage only. It is always difficult to raise a Case of Satisfaction against a class of Persons ; but it is still more difficult, if not impossible, where the Class is not the same. The Estates are not to be sold until the expiration of Six Months after the Testator's death. Under the Will, if a Child, whether a Son or a Daughter, dies under 21 leaving Issue, the Issue will take both the surviving and original Shares of their Parent. By the Settlement, if a Son dies under 21 leaving Issue, his Share will go to his surviving Brothers and Sisters. There is no Maintenance-clause in the Will ; so that the Testator intended to throw the Children on the Maintenance-clause in the Settlement. There is no Case in which Land, or Land devised to be sold, has been held to be a Satisfaction of a Portion. *Grave v. The Earl of Salisbury* (a). In *Rickman v. Morgan* (b) the Gift of a Residue was held to be a Satisfaction of a Portion ; but there it was provided, by the Settlement, that, if the Father should, in his lifetime, or *at the time of his death*, give, to any of his younger Children, Money or Lands, for advance-

(a) 1 Bro. C. C. 425.

(b) 1 Bro. C. C. 63 ; 2 Bro. C. C. ; 388, 394.

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ment in Marriage *or otherwise*, the Value thereof should be deducted from their Portions. Those words left the question clear from all doubt. The Case of *Bengough v. Walker* (c) was decided on the evident intention of the Testator.

Mr. *Knight* and Mr. *Spence*, in support of the Bill :

There is a specific Provision, in the Settlement, that, if the Father should advance any of his younger Children in his lifetime, such Advancement should be a Satisfaction of their Portions, unless the Father, should, by writing under his hand, direct the contrary : and it is quite settled that a Provision by Will is an Advancement by the Testator in his lifetime. *Leake v. Leake* (d), *Goolding v. Haverfield* (e). Where, as in this Case, the Settlement declares that an Advancement shall be a Satisfaction of the Portion, you have not to inquire as to the intention of the Party in making the Advancement. The Testator, having the Settlement in his mind, did not think it necessary to repeat what the Settlement had declared.

[*The Vice-Chancellor* :—Where the Settlement declares that an Advancement shall be a Satisfaction unless the contrary is declared, and an Advancement is made without any such Declaration, the Court is at liberty to infer, from the Instrument that creates the Advancement, that it was not intended to be a Satisfaction.]

There is no reason why Land directed to be converted

(c) 15 Ves. 507.

(d) 10 Ves. 477.

(e) Maclel. 345 ; S. C., 13 Price, 593.

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into Money, should not be an Advancement ; and, if it is an Advancement, it is a Satisfaction. *Leake v. Leake* decides that an unascertained Fund may be a Satisfaction of a Portion. The ground of the decision in *Twisden v. Twisden* (f) was not that the Fund was unascertained, but that there was an Intestacy. In deciding on questions of Satisfaction, slight circumstances of difference between the two Provisions, are not to be taken into consideration. The Testator uses the word 'Portion' in his Will: and, although the Provision by the Will is not confined to the Children of the Marriage, but extends to all the Children that the Testator might have, yet the Children of the Marriage must have been, at all events, entitled to a Share of the Provision under the Will, and the only effect of letting in the Children of a subsequent Marriage, would have been that the Shares of the Children of the first Marriage, would have been diminished in amount.

This Case is decided by *Rickman v. Morgan*, in which all the same difficulties were raised, as have been raised in the present Case (g).

The VICE-CHANCELLOR :

It hardly can be supposed that the Testator, when he made the Provision by his Will, was contemplating the Children of a subsequent Marriage, because, by his Will, he gives a Legacy to his Wife.

I do not know that it ever has been decided, where Portions have been provided for younger Children as in this Settlement, and the Father has, afterwards, by his

(f) 9 Ves. 413. (g) See 2 Bro. C. C. 396.

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GILLIBRAND.

Will, given to them a Sum of Money to arise from the sale of Real Estate, that that Provision should not be a Satisfaction of the Portions. I see no substantial difference between Money to arise from the sale of Real Estate, and from the sale of Personal Estate, which may include Chattels Real: and it has been decided that a Gift of the Residue of Personal Estate, may be a Satisfaction.

It would however be premature to decide the Question, until it has been ascertained whether there is any Fund remaining after payment of the Testator's Debts, which may be a Satisfaction. It seems to me, therefore, necessary that the Cause should go on to a hearing, and the Demurrer must be over-ruled (*h*).

(*h*) See *Powys v. Mansfield*, *ante*, 528.

JENKINS v. BRIANT.

16. Sim 272

THIS was a Suit to establish the Will of *John Briant*, who died in 1823, and to carry the Trusts of it into execution.

By the Decree, The *Master* was directed to take an Account of the Testator's Debts and Legacies, and of the Charges and Incumbrances affecting his real Estates.

It appeared that the Testator was seised of a Freehold Estate situate at *Maudlin's Rents, East Smithfield, Middlesex*, and of another Freehold Estate called the *Berwick and Leith Wharf* Estate, both of which he devised to his Wife and his Sons *W. H. Briant* and *C. Briant*, and *W. Back*. It also appeared that, some years before his death, he had voluntarily granted to each of his Sons-in-Law, the Plaintiff *J. R. Jenkins* and the Defendant *Jeremiah Evans*, an Annuity of 100 *l.*, issuing out of his *Maudlin's Rents* Estate; and that he had entered into Covenants with them for payment of their respective Annuities. The *Maudlin's Rents* Estate had been purchased by the *St. Katherine Docks Company*, and the Purchase-money was paid into the Court of Exchequer, under the Act of Parliament for making those Docks. The Annuities did not become in arrear until some time after the Testator's death.

The *Master* reported that the Annuities and the

1834 :
30th April.

Practice.
Exception to
Report.

Where a *Master* reports as to matter not referred to him, his Report ought not to be excepted to; but it ought to be referred back to him to be reviewed; and, even if that is not done, the unwarranted finding will be disregarded.

Specialty Debt.
Annuity.

Where a Testator has entered into a voluntary Covenant to Pay an Annuity, the Annuitant is a Specialty Creditor on his Real Estates, although the Annuity did not become in arrear till after the Testator's death.

Cope v Cresswell 2 Law Rep. 69 109 M & W - Tucker
4 on app. 2 L. Rep. Ch. 116 *S. Hare. 79.*

1834.

JENKINS

v.

BRIANT.

Arrears thereof, were charges on the Proceeds of the *Maudlin's Rents* Estate, and that *Jenkins* and *Evans* would be Specialty Creditors, by *Covenant*, upon the *Berwick and Leith Wharf* Estate, for any deficiency of the Proceeds of the *Maudlin's Rents* Estate to secure the Annuities and the Arrears and future Payments thereof.

The Defendant *Mary Briant*, the Testator's Widow, excepted to the Report, insisting that The *Master* ought not to have certified that *Evans* and *Jenkins* were and would be Specialty Creditors of the Testator; and, if he ought to have certified that they were and would be Specialty Creditors, that he ought not to have certified that they were and would be Specialty Creditors, by *Covenant*, upon the *Berwick and Leith Wharf* Estate.

The *Solicitor-General* and Mr. *O. Anderdon*, in support of the Exception, contended, First: that the Annuitants could not be Specialty Creditors of the Testator, as nothing was due to them at the Testator's death. *Wilson v. Knubley* (a). Secondly: that The *Master* had found that the Annuitants were Specialty Creditors *whose Debts affected a particular Estate of the Testator*, as to which no Inquiry was directed by the Decree.

Mr. *Garratt* and Mr. *Tamlyn* also appeared to support the Exception; but the Court refused to hear them, as their Client had not excepted to the Report.

(a) 7 East, 128.

Sir *E. Sugden*, Mr. *Knight*, Mr. *Koe* and Mr. *Campbell*, in support of the Report :

1834.

JENKINS
v.
BRIANT.

Wilson v. Knubley has nothing to do with this Case. There, it was decided that an Action of Debt could not be maintained on a Covenant for Title, as *Damages* only could be recovered for a Breach of the Covenant. There is no doubt that an Action of Debt may be maintained on a Covenant to pay a certain Sum or a Sum the Amount of which may be ascertained. The obligation existed at the Testator's death, though nothing was then due. As soon as anything became due, it was a Specialty Debt. The Covenant in this Case precisely resembles a Bond, which, though not due at the Testator's death, the Heir or Devisee is bound to pay as soon as it becomes due. Bac. Ab. *Debt*. Com. Dig. *Debt* (A. 4). *Wilson v. &c.* (b) : *Tanner v. Byne* (c) ; *Jeudwine v. Agate* (d).

The VICE-CHANCELLOR :

It is laid down, in one of Lord *Bacon's* Orders (e), that if a *Master* reports as to a matter which is not referred to him, his Report, so far as it relates to that matter, is to be treated as a nullity. In such a Case, however, the proper course is not to except to the Report ; but, before it is confirmed, to apply to the Court that it may be referred back to The *Master* to review his Report. But if no such Application should be made, and the Report should be confirmed, the Court would pay no attention to it, except so far as it was warranted by the Decree.

(b) Hard. 332.

(c) *Ante*, Vol. I., page 160.

(d) *Ante*, Vol. 3, page 129.

(e) See Beames's Ord. 23.

1834.

JENKINS
v.
BRIANT.

Here The *Master* was directed to take an account of the Testator's Debts ; but he was not directed to inquire whether there were any Specialty Debts affecting any particular Estate : and, instead of finding, merely, that these Annuitants were Specialty Creditors, he has reported that they have a Lien on a particular Estate.

The *Master* was right in reporting that the Annuitants were Specialty Creditors ; but he had no authority to find that their Annuities were Charges on any particular Estate. It was, however, irregular to except to his Report on that account : and, therefore, on both grounds, the exception must be over-ruled.

1836.
6th and 7th
June.

The Cause now came on to be heard for further Directions.

The Question was whether, under the Statute of Fraudulent Devises (*f*) The *Berwick and Leith Wharf* Estate, was chargeable, in the hands of the Devises, with the deficiency of the Proceeds of the *Maudlin's Rents* Estate, to answer the Arrears of the Annuities.

Mr. *Jacob* and Mr. *Campbell*, for the Plaintiffs, said that the Covenants entered into by the Testator, were for payment of certain ascertained Sums of Money, and, therefore, they constituted a Debt against the Testator's Real Assets, whether devised or not.

Mr. *Wigram* and Mr. *O. Anderdon*, for the Defendant, Mrs. *Briant* :

1834.

JENKINS
v.
BRIANT.

The Annuities are Charges on the *Maudlin's Rents* Estate alone, and not on the *Berwick and Leith Wharf* Estate, which is devised away. The Covenants were voluntary, and were entered into, not for the payment of gross Sums, but of Sums, *de anno in annum*; and there were no Arrears at the Testator's death. The Testator died before the passing of the late Act (*g*) which, for the first time, rendered Devises of real Estates void as against Covenantees. *Wilson v. Knubley* (*h*); *Lomas v. Wright* (*i*); *Farley v. Briant* (*k*).

Mr. *Duckworth*, Mr. *Cooper*, Mr. *Tamlyn*, Mr. *James Parker* and Mr. *Rudall* appeared for the other Defendants.

Mr. *Jacob*, in reply :

In *Morrant v. Gough* (*l*) the Annuity was not in Arrear at the death of the Devisor; but it was decided that the Devisee, if he had been a Devisee in Fee, would have been liable to pay the Annuity so long as it lasted: as, however, the Estate was devised to him during the Infancy only of the Testator's Son, it was held that he was liable to pay the Annuity during the period only for which he had the Land.

The VICE-CHANCELLOR:

The Question comes to this; whether a Person who Covenants to pay a specific Sum of Money, *de anno in annum*, is not liable to an Action of Debt. The reason of the decision in *Wilson v. Knubley*, was that the

(*g*) 11 Geo. 4 & 1 Will. 4,

c. 47.

(*h*) 7 East, 128.

(*i*) 2 Myl. & Keen, 769.

(*k*) 5 Nev. & Mann. 42.

(*l*) 7 B. & C. 206.

1834.

JENKINS

v.

BRIANT.

3d W. & M. c. 14, in the 3d Section, speaks of an Action of *Debt*. There the Covenant was contingent, and unascertained Damages only could be recovered for a Breach of it. Here the Covenants are absolute, and the Sums to be recovered are certain.

Declare that the *Berwick and Leith Wharf Estate* is chargeable with the Arrears of the Annuities, in the hands of the Devisees.

1834 :
1st May.

EWING v. OSBALDISTON

*Production of
Documents.
Defendant.*

If a Defendant makes Statements in his Answer sufficient to show that he has incurred Penalties, he cannot refuse to produce Documents referred to in it, on the ground that they afford Evidence of his being subject to the Penalties.

THE Bill was filed to have the Accounts taken of a Partnership, between the Plaintiff and the Defendant, in the *Surrey Theatre*. The Defence made by the Answer, was that the Partnership Business was illegal. The Defendant, however, did not refuse to answer any of the Allegations in the Bill, but stated circumstances sufficient to show that the Parties had incurred the Penalties imposed by 10 Geo. 2, c. 28.

The Plaintiff now moved that the Defendant might be ordered to produce certain Books and other Documents referred to in the Answer.

The Motion was resisted on the ground that the Court would not compel a Defendant to make a Discovery which would subject him to Penalties.

King of the Two Sicilies v. Willcox 1 Sim. N.S. 319.

Sir *E. Sugden* and Mr. *Stuart*, in support of the Motion, cited *Green v. Weaver* (a); *Nash v. Ash* (b).

1834:

Ewing

v.

OSBALDISTON.

Mr. *Beames* and Mr. *Carpenter*, for the Defendant, referred to *Nelme v. Newton* (c); *The King v. Glossop* (d); *The King v. Neville* (e).

The *Vice-Chancellor* said that this Case did not come within the principle of *Nelme v. Newton*; for, there, the Defendant had insisted that he ought not to be compelled to Answer as to the alleged Partnership; but, in this Case, the Defendant had made admissions in his Answer, which clearly showed that he had incurred the Penalties of the Act, and, consequently, that he could not be damnified by a production of the Documents.

Motion granted.

(a) *Ante*, Vol. I, 404.

(d) 4 Barn. & Ald. 616.

(b) 1 Eden 378.

(e) 1 Barn. & Adol. 489.

(c) 2 Youn. & Jerv. 186.

Note.

See Locke v. Turner. 14 Sim. 218.

1834:
6th May.

Practice.
Cause and
Cross Cause.

A. filed a Bill against *B.* which *B.* answered, and then filed a Cross Bill against *A.*—*A.* not having answered the Cross Bill, *B.* issued an Attachment against him, but was unable to serve it, as *A.* was resident abroad. *A.* proceeded to examine Witnesses in his Cause.

The Court, on the Application of *B.* ordered Publication not to pass in *A.*'s Suit, until he should have put in his Answer and cleared his Contempt in *B.*'s Suit, and the Court should order Publication to pass.

PALMER v. LEYCESTER, BOOTH AND OTHERS.

ON the 21st of January 1833, *James Booth*, on behalf of himself and the other Creditors of *Sir John Palmer*, deceased, filed a Bill against *Ralph Leycester* and others, for the purpose, amongst other things, of having the Produce of certain Property, called *The Hanway Street Property*, applied in discharge of the Incumbrances affecting the same.

On the 13th March 1833, the Plaintiff, *Sir Wm. Palmer*, filed the Bill in this Cause, to establish his right to the same Property and the Accumulations thereof, and to have the Produce applied in discharging the Incumbrances thereon.

Booth and the other Defendants filed their Answers to *Sir Wm. Palmer's* Bill, in July 1833; and those Answers were not excepted to.

On the 6th of November 1833, *Booth* amended his Bill by making *Sir Wm. Palmer*, (who was the Heir-at-Law of *Sir John Palmer*), a Defendant. *Sir Wm. Palmer* took out all the Orders for time to Answer that Bill. The last Order expired on the 14th of February 1834; and, then, *Booth's* Solicitor, at the request of *Sir Wm. Palmer's* Solicitor, allowed *Sir William* additional time for putting in his Answer. That time having expired without the Answer being filed, *Booth*, on the 15th of April 1834, issued an Attachment against *Sir William*, but was unable to execute it owing to *Sir William* being resident abroad. On the

8th of March 1834, Sir *William* replied in his Cause, and, shortly afterwards, served Subpœnas to rejoin; and he was proceeding to examine his Witnesses.

1834.
PALMER
v.
LEYCESTER
AND OTHERS.

Booth now moved that Sir *Wm. Palmer* might be restrained from all further Proceedings in his Cause, until he should have put in his Answer and cleared his Contempt in *Booth's* Suit: or that Publication might not pass in Sir *William's* Cause, until he should have put in his Answer and cleared his Contempt, and the Court should order Publication to pass.

Sir *E. Sugden* and Mr. *Wakefield* in support of the Motion :

The *Solicitor-General* and Mr. *Lovat* for Sir *William Palmer*.

Sir *William* was not made a Party to *Booth's* Suit until November 1833; and, therefore, *Booth* never had a right to compel Sir *William* to answer his Bill, before he answered Sir *William's* Bill; and, if *Booth* ever had any such right, he lost it by amending his Bill. *Noel v. King* (a).

Sir *E. Sugden* in reply :

Noel v. King does not touch this Case. It decides, merely, that a Plaintiff in an original Cause, by amending his Bill, loses his right to compel an Answer to it before he answers the Cross Bill. *Booth* has answered Sir *William's* Bill; but Sir *William* is going on to publication in his own Suit, before he has answered *Booth's* Bill.

It is admitted, by the Affidavit made by Sir *William's*

(a) 2 Madd. 39a.

1834.
 PALMER
 v.
 LEYCESTER
 AND OTHERS.

Solicitor, that both Suits are for the same object. *Booth* cannot examine his Witnesses properly, without having Sir *William Palmer's* Answer and a production of Documents in his possession: but Sir *William* is examining his Witnesses with the advantage of the Discovery which he has had from *Booth*.

Besides, he was allowed further time to put in his Answer, by which *Booth's* Suit was delayed: he did not, however, keep his engagement. That ground is, of itself, conclusive.

The VICE-CHANCELLOR:

Sir *William Palmer* filed his Bill on the 13th of March 1833. The last Answer in that Cause was filed in July 1833. Long before the time for passing Publication arrived, Mr. *Booth* filed his Cross Bill against Sir *William Palmer*, by amending his Bill. This was done on the 6th of November 1833. Up to this time Publication has not passed in the original Cause; and the Discovery is not wanted for *constructing* the Defence in the original Cause; but it may be material for *supporting* the Defence in the original Cause. It would be strange to say that Sir *William Palmer* is to go on with his Suit, at the same time that he withholds his Answer from the Plaintiff in the Cross Cause.

Order made according to the second alternative of the Notice of Motion.

CASES IN CHANCERY.

613

BERKELEY v. SWINBURNE.

PAUL FRANCIS BENFIELD, Esq., by his Will, dated the 21st of April 1827, gave his Residuary Real and Personal Estate to Trustees, in Trust to sell and convert the same into Money, and to invest the Proceeds in the usual Securities in their own names: and he directed his Trustees to stand possessed of the Trust-Funds, in Trust for his Mother, for her life, and, after her decease, in Trust for all the Children (if there should be more than one) of his Sisters *Henrietta Sophia*, the Wife of *Robert Berkeley*, Esq., and *Caroline Martha*, the Wife of *Grantley Berkeley*, Esq. (exclusive of an eldest or only Son), or, if there should be no Son of either of his Sisters, exclusive of an only Daughter of either of them, to take in equal Shares, as Tenants in Common, absolutely, and to be vested Interests in Sons at 21 and in Daughters at that age or Marriage: and, in case any of the said Children should die without having attained Vested Interests, then in Trust for the others of them; or, in case there should be, originally, only one Child of his Sisters besides an eldest or only Son of each of them, or besides an eldest or only Son of one of them and an only Daughter of the other of them, then in Trust for such only Child absolutely: but in case there should be no Child who should attain a Vested Interest under the Trusts aforesaid, then in Trust for the only Son or only Daughter of his Sister, *Henrietta Sophia*, and the only Son or only Daughter of his Sister, *Caroline Martha*, as Tenants in Common, absolutely: but in case there should be no Son or Daughter of either of his Sisters who should attain a Vested Interest in the Trust-

1824:
2d May.

Will.
Construction.
Maintenance.

A Testator gave his Residuary Estate to Trustees, in Trust for his Sister's younger Children equally, and to vest in them at the usual periods; and he directed his Trustees, during the Minorities of the Children, to pay the Interest of their Shares, to his Sisters or to the Guardians of the Children, to be applied for their Maintenance and Education. Held that the sisters were entitled to receive the Interest of their Children's Shares during the Minorities of their Children.

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SWINBURNE.

Funds, then in Trust for the only Child of the other of his Sisters absolutely : and in case there should not be any Child of either of his Sisters who should attain a Vested Interest, then in Trust for his Next of Kin.

“ Provided always that it shall be lawful for the Trustees or Trustee for the time being of this my Will, during the life of my said Mother with her consent, and, after her decease, at the request of my said Sisters respectively, or of the respective Guardians for the time being of the Child or Children of my said Sisters respectively, in case my said Sisters shall respectively have departed this life, to apply, settle or appropriate the whole or any part of the principal Trust-Monies to which, under the Trusts hereinbefore contained, such Child or Children respectively shall be entitled, for or towards the Advancement in the world or otherwise for the Benefit of such Child or Children respectively, either by way of Marriage Portion or in any other manner, with and under such Conditions and Restrictions, or without any Condition or Restriction as, to my said Sisters respectively or the said Guardians respectively, shall seem expedient, notwithstanding such Child or Children respectively, being Son or Sons, shall not have attained the age of 21 Years, or, being a Daughter or Daughters, shall not have attained that age or have been married.”

“ Provided also that, in case, at the death of my said Mother, any Child or Children of my said Sisters respectively who, under the Trusts hereinbefore contained, may be entitled to any Vested or Presumptive Share or Shares of the said Trust-Monies, &c., shall not, being a Son or Sons, have attained the age of 21

Years, or, being a Daughter or Daughters, have attained that age or have been married, then the Trustees or Trustee for the time being of this my Will, shall place out or continue at Interest on the Security or Securities aforesaid, and, from time to time, call in and replace out the Share or Shares of such Child or Children respectively, and pay the Dividends, Interest and Produce of the Share of each such Child or Children respectively, being a Son or Sons, during his Minority, or, being a Daughter or Daughters, during her Minority and Discoverture, unto my said Sisters respectively ; or, in case of their deaths respectively, unto the Guardians for the time being of such Child or Children respectively, to be applied in and towards the Maintenance and Education of such Child or Children respectively or otherwise for their respective Use and Benefit."

1834.
BERKELEY
v.
SWINBURNE.

The Testator died in May 1828, and his Mother died in August following. *Henrietta Sophia Berkeley* had nine Infant Children, four of whom were born before the Testator's death: and *Caroline Martha Berkeley* had Two Infant Children, both of whom were born before that event. The Suit was instituted by their Younger Children born before the Testator's death, praying that the Will might be established and the Trusts performed. The question was whether, under the Will, the Testator's Sisters were entitled to receive the Income of the Younger Children's Shares of the Trust-Funds, notwithstanding their Fathers might be of ability to maintain them.

Mr. Barlow for the Plaintiffs :

A Father, if he is able, is bound to maintain his Children, notwithstanding a Fund may be provided for their Maintenance.

1834.

BERKELEY
v.
SWINBURNE.

In *Hamley v. Gilbert* (a) the Testatrix directed that the residue of the Monies arising from her Estate and Effects, which she had before directed to be paid over to her Niece, should be laid out and expended by the Niece, at her discretion, for or towards the Education of her Son, and that she should not be liable to account for the application of it: and the Court held that she was entitled to the residue, subject to the application of so much as the Court might think fit, to the Education of her Son. In *Hammond v. Neame* (b) a Sum of Stock was given to a Trustee, in Trust to pay the Dividends into the hands of the Testator's Niece, for the Maintenance of her Children. The Niece had no Children, which must have been known to the Testator, her Uncle. And the Court held that the Children were not direct objects of bounty, but only the occasion of bounty to the Niece. Both those Cases were decided on the particular expressions used in the Wills on which they arose: and all that *Hammond v. Neame* decided, was that, so long as there was no Child, the Testator's Niece was entitled to receive the Dividends of the Stock for her own Benefit. Here the Testator has created a Fund for the Maintenance of the Children, and has directed it to be applied for that purpose by a particular Person. The Mother and the Guardian are mentioned in the same sentence. In case the Mother dies, is the Guardian to receive and spend the Interest of the Children's Shares?

Sir *W. Horne*, Sir *E. Sugden*, Mr. *Swanston*, Mr. *Matthews*, Mr. *Daniell*, Mr. *Lowndes*, Mr. *Kindersley*, Mr. *Wigram*, Mr. *Pole* and Mr. *Winterbottom* appeared for the different Defendants.

(a) Jac. 354.

(b) 1 Swans. 35.

But The VICE-CHANCELLOR, without hearing them, said :

I think that, notwithstanding the Testator has mentioned the Guardians in their official capacity, he has used language which shows that he intended to give his Sisters a beneficial Interest in the Income of their Children's Shares of his Residuary Estate, during the Minorities of the Children.

The Decree declared that, according to the true construction of the Will, the Defendants *Henrietta Sophia Berkeley* and *Caroline Martha Berkeley*, were respectively entitled to receive the Interest arising from the Shares of their respective younger Children, of and in the Testator's Residuary Estate, during their Minorities respectively ; but without prejudice to the question as to what Children might be ultimately entitled to share in the Testator's Residuary Estate.

1834.

BERKELEY.

v.

SWINBURNE.

RHODES v. Warburton.

MOSES RHODES, by his Will, gave all his Estate and Effects to his Nephews and Nieces living at his death, and appointed *George Rhodes*, and *John Rhodes* since deceased, two of his Nephews, his Executors.

The Bill was filed by *George Rhodes* and the other surviving Nephews and Nieces of *Moses Rhodes*, and by the Personal Representatives of his deceased Nephews and Nieces living at his death, against *Thomas Warburton*, alleging a Partnership to have subsisted between

1834:
26th May.

Pleading.
Parties.

A Bill is not demurrable, because the Legatees of a Testator, join with his Executor, in suing for a Debt due to his Estate.

Roberts v Roberts
2 Dec 1829

1834.
 RHODES
 v.
 WARBURTON.

the Defendant and *Moses Rhodes*; and praying that the Affairs of the Partnership might be wound up, and that the Amount of the Share and Interest of *Moses Rhodes* therein and in the Profits thereof, might be ascertained and paid to *George Rhodes*, as the surviving Executor of *Moses Rhodes*, for the Benefit of himself and the other Plaintiffs.

The Defendant put in a general Demurrer.

Mr. *Knight* and Mr. *Wright*, in support of the Demurrer :

The Executor represents both the Legal and Beneficial Ownership of the Testator's Property. *Non constat* that any part of the Testator's Property, will come to his Legatees; for his Creditors are to be first satisfied. The Rule is that a Legatee or Creditor cannot sue for a Debt due to the deceased, unless there is collusion between the Executor and the Party sued. Besides, in the course of the Cause, we shall be under the necessity of examining some of the Co-Plaintiffs as Witnesses.

Sir *E. Sugden* and Mr. *Stuart*, appeared in support of the Bill.

But The VICE-CHANCELLOR, without hearing them, said :

Legatees cannot file a Bill against a Debtor to their Testator's Estate, unless there is collusion between the Executor and the Debtor. But, if the Executor chooses to make the Legatees Co-Plaintiffs with him, I do not think that that superfluity renders the Record not sustainable. Persons are brought here who are not necessary Parties to the Suit; but it is not so injurious as to make the Bill

not sustainable : it is not an Objection that a Defendant can take.

1834.

RHODES

v.

WARBURTON.

Demurrer over-ruled.

LANDARS v. ALLEN.

1834-
29th May.

Practice.
Contempt.

AN Attachment had issued against the Defendant, for want of Answer. The Answer was afterwards filed, and the Plaintiff took an Office Copy of it; but the Defendant had not paid the Costs of his Contempt.

An Attachment had issued against a Defendant for want of Answer. The Answer was afterwards filed, and the Defendant took an Office Copy of it, the Costs of the Contempt remaining unpaid. Held that the Plaintiff had waived his right to enforce Payment of the Costs by Process of Contempt.

Mr. *Spence*, for the Defendant, now moved to dismiss the Bill for want of Prosecution.

Sir *E. Sugden*, for the Plaintiff, said that the Defendant was not entitled to move, as he had not paid the Costs of the Attachment.

Mr. *Spence* replied that the Plaintiff, by taking an Office Copy of the Answer, had waived his right to enforce payment of the Costs by process of Contempt. *Anon* (a); *Smith v. Blofield* (b); *Const v. Ebers* (c).

H. Lordman v. Threlkeld & Co. 1834.

The Motion was mentioned again on this day, by Sir *E. Sugden*, who referred to *Watson v. Fairlie* (d), and said that the Officers of the Court had been consulted,

(a) 15 Ves. 174.

(c) 1 Madd. 530.

(b) 2 V. & B. 100.

(d) Reg. Lib. B. 1824 fo. 1581.

10th July.

1834.

LANDARS

v.

ALLEN.

and that they were unanimously of opinion that the taking of an Office Copy of the Answer, was not a Waiver of the Contempt.

The *Vice-Chancellor*, after taking time to consider the Question, decided that the Defendant, by taking the Office Copy, had waived his right to enforce payment of the Costs by Process of Contempt, and that the Defendant was entitled to make his Motion.

1834:
26th November.

Practice.
Order.

By a mistake in The Registrar's Office, an Order made on an undertaking to Speed, was erroneously drawn up. The Order was discharged, with Costs of the Application to discharge it; it being the duty of the Party who procures an Order, to see that it is properly drawn up.

The Plaintiff having undertaken to speed, an Order, dated the 29th of May 1834, (which was in Trinity Term) was drawn up, by which it was ordered that the Plaintiff should file a Replication, serve Subpœnas to rejoin, and obtain and serve an Order for a Commission to examine Witnesses, if he required such Commission, within three Weeks from the date of the Order, and give Rules to produce Witnesses and pass Publication in *Michaelmas* Term, and set the Cause down for Hearing and serve Subpœnas to hear Judgment in *Hilary* Term, or, in default thereof, that the Bill should stand dismissed.

Sir *E. Sugden*, for the Plaintiff, now moved to discharge the Order, for Irregularity, with Costs, on the ground that *Michaelmas* Term was inserted in it, instead of *Hilary* Term, and *Hilary* instead of *Easter* Term (a).

Mr. *Knight* and Mr. *Spence*, for the Defendant, admitted that the Order was erroneous, but said that the

(a) See 16th and 17th Orders of 1831.

mistake arose in the Registrar's Office, and that the Order ought to be corrected and not discharged.

1834.

LANDARS

v.

ALLEN.

The VICE-CHANCELLOR :

It is the duty of the Party who procures an Order, to see that it is properly drawn up ; and, if he allows an irregular Order to be drawn up, he must pay the Costs of discharging it.

Motion granted.

NORMAN v. BALDRY.

1834:

2d June.

*Executor.
Administrator.*

ON the Marriage of *William Baldry* with *Ann Freston*, he, together with *Simon Baldry*, executed a Joint and Several Bond, dated the 7th of October 1802, to *W. Lewis*, conditioned for the payment, by the Heirs, Executors or Administrators of *William Baldry*, within Three Months after his decease, of 490 l. to *Ann Freston*, in case she should survive him ; but, in case she should die in his lifetime, then for the payment by him, of 200 l. within Six Months after the death of *Ann Freston*, to the Persons therein named.

An Executor will be allowed Payments made by him to simple Contract Creditors of his Testator, a Bond being in existence but not payable ; but he will not be allowed Payments to Legatees, notwithstanding he had no notice of the Bond.

Simon Baldry died in March 1820. *Ann Baldry* died in April 1831, leaving her Husband her surviving.

William Baldry having become Insolvent, the Persons entitled to the 200 l. under the Bond, filed, in 1832, a Creditor's Bill against the Executors of *Simon Baldry*.

*Taylor v. Taylor 10 Eq. 478
Re the Fyfe Estate 3 D. J. 572*

1834.

NORMAN
v.
BALDRY.

The Executors, in their Answer, said' that they had applied the whole of *Simon Baldry's* Personal Estate in payment of his Debts and Legacies: and that they never heard of the Bond until October 1831.

Mr. *Knight* and Mr. *Spence* for the Plaintiffs.

Sir *E. Sugden* and Mr. *Thomson*, for the Defendants, the Executors of *Simon Baldry*, said that, as the Plaintiffs had suffered Nine years to elapse, without giving the Executors any notice of the Bond, they were not entitled to sue the Executors. In *The Governor and Company of the Chelsea Water-works v. Couper* (a), Lord *Kenyon* expresses it to be his opinion that, where an Executor has paid his Testator's Debts and Legacies, and paid over the remainder of the Estate to the Residuary Legatee, and has had no notice of any other subsisting demand, provided he had not done it too precipitately, it was a good Answer to an Action on a Bond. The Statute having directed that no Legacies should be claimed before the end of One year from the Testator's death, seems to have meant to give that time for Creditors on the Estate to make their Claims, or, at least, to give notice to the Executor that there were such Claims subsisting.

Mr. *Bridger* and Mr. *Bichner* appeared for other Defendants.

The *Vice-Chancellor* said that he had always understood the Law to be that an Executor who had paid simple Contract Creditors of his Testator, a Bond

(a) 1 Espin. N. P. 6. 275.

being in existence but not then payable, ought to be allowed those Payments; but that an Executor was liable, if he paid the Legatees, notwithstanding he had no notice of the Bond (*b*): and that he was not disposed to agree to what was attributed to Lord *Kenyon* in the Case cited.

1834.
NORMAN.
v.
BALDREY.

(*b*) See *Hawkins v. Day*, Amb. 160. 3. *h* & 6. 126

HOLLAND v. SPROULE.

1834:
3d June.

WILLIAM PHELPS died in 1825, being, at his death, indebted, on Bond, to the Plaintiff. In 1827, Letters of Administration to the deceased, with his Will annexed, were granted to *Betsy Olive*. *Betsy Olive* died in 1829, having got in the Testator's Estate, and having appointed the Defendant, *Sproule*, her Executor; and he proved her Will and got in her Estate. In 1831 Letters of Administration *de bonis non* of *Phelps*, were granted to the Defendant *Prior*.

Plea and Pleading. Account. Release.

The Bill, which was filed on the 11th of July 1831, prayed for an account of what was due on the Bond, and also for an account of *Phelps's* Estate possessed by *Betsy Olive* and *Prior*.

A. died Indebted to *B.*
C. took out Administration to *A.*, got in his Estate and afterwards died.
D. took out Administration to *A.*—*B.* filed a Bill against *D.* and *C.'s* Executor, for an Account of *A.'s* Estate possessed by *D.* and by *C.* The Executor pleaded an Account stated by him to *D.* after the filing of the Bill and a Release

Sproule pleaded that he had come to an account, with *Prior*, in respect of *Phelps's* Estate possessed by *Betsy Olive*, and that a Balance of 471 *l.* was found due to *Phelps's* Estate, and that, on the 6th of August 1831,

executed to him by *D.* on Payment of the Balance; but did not annex the Account to his Plea. Held that the Plea was not double; and that it was not necessary to annex the Account to the Plea.

1834.

HOLLAND
v.
SPOULE.

he paid that Sum to *Prior* : and that, by a Deed Poll dated the same day, after reciting (amongst other things) that *Prior* having required *Sproule*, as the Executor of *Betsy Olive*, to account for *Phelps's* Estate come to her hands, *Sproule* had rendered, to *Prior*, an Account marked A. bearing even date with the Deed Poll, by which a Balance of 471 *l.* appeared to be due from *Betsy Olive's* Estate to *Phelps's* Estate, and that *Prior* had examined and approved of the Account, as he thereby acknowledged : It was witnessed that, in consideration of the 471 *l.* paid to *Prior* by *Sproule*, *Prior* released *Sproule*, as the Executor of *Betsy Olive*, from all Claims and Demands in respect of *Phelps's* Estate. The Plea concluded by setting forth the Receipt for the 471 *l.* indorsed on the Deed Poll.

Sir *E. Sugden* and Mr. *Stinton*, in support of the Bill:

First: The Plea is Double. It consists of a stated Account, and also of a Release; either of which would have been a sufficient Plea by itself.—Secondly: The Defendant ought to have annexed the Account to his Plea. It was rendered to a third Party, and the Plaintiff knows nothing of it. *Hankey v. Simpson* (a).—Thirdly: The Account was rendered after the Bill was filed, in order to prevent the Suit. The Court will not support such an Account and Release, as against Creditors.

Mr. *Knight* and Mr. *Wakefield* for the Plea.

The VICE CHANCELLOR:

The Account and Release must be taken together.

What the Plea states as to the Account, is nothing more than an Averment that the recitals of the Release are true.

1834.
HOLLAND
v.
SPROULE.

The Bill does not, and, indeed, could not seek to impeach the Account, which was not rendered until after the Bill was filed; and, therefore, it was not necessary to annex the Account to the Plea.

The Account and the Release constitute one fact, which will be a bar to the Suit as against the Defendant *Sproule*: and, therefore, I think that the Plea ought to be allowed.

TASKER v. SMALL.

1834:
15th July.

ARTHUR GEORGE SMALL being Tenant in Tail Male of certain Estates, subject to the Life-Estate of *Martha Lucas* therein, by Articles of Agreement dated the 3d of December 1830, after

Deed. Construction. Power of Sale.

A. being Tenant in Tail of an Estate, in

remainder expectant on the death of *B.*, entered into Articles, on his Marriage, by which, after reciting that it had been agreed that the Estate should, subject to *B.*'s Life-Interest therein and to the raising, by *Mortgage or otherwise*, of any Sum or Sums not exceeding 15,000 *l.*, for *A.*'s use, be settled to the uses thereafter expressed, he covenanted that he would, subject to the raising, by any ways or means and at any time or times he should think proper, of the Sum or Sums before-mentioned, by *Mortgage, Annuity or otherwise*, for his own benefit, and to any Deed or Deeds he might make for securing the repayment thereof and Interest, do all necessary acts for settling the Estate, subject to *B.*'s Life-Interest, in the manner agreed upon. Held that *A.* was authorized to raise the 15,000 *l.* by Sale; and that he was justified in selling his Interest in remainder in the whole of the Estate, as the 15,000 *l.* was nearly the full value of such Interest.

1834.

TASKER

v.

SMALL.

reciting an intended Marriage between *Small* and *Matilda Webb Edwards*, and that, upon the Treaty for the Marriage, it was agreed that the Estates should (subject to the Estate for Life therein of *Martha Lucas*, and to the raising, by Mortgage or otherwise, of any Sum or Sums of Money, not exceeding, in the whole, the Sum of 15,000 l., by and for the said *Arthur George Small*) be conveyed to the uses, and upon and for the Trusts, &c. thereafter expressed: It was witnessed that *Small* did, thereby, for himself, his Heirs, &c., covenant with *Charles Samuel Ashford*, the Lady's Uncle, that he would, as soon as conveniently might be after the Marriage (subject and without prejudice to the raising, by any ways or means, and at any time or times he, the said *Arthur George Small*, should think proper, of any Sum or Sums of Money, not exceeding in the whole the Sum of 15,000 l., by Mortgage, Annuity, or otherwise, for his own use and benefit, and to any Deed or Deeds and Assurances which he might thereafter make and execute for securing the repayment of such Sum or Sums of Money and the Interest thereof) make and execute all such Deeds and Assurances as should be requisite for settling the Estates (subject to the Life-Interest of *Martha Lucas*), to the use of *Ashford*, his Heirs and Assigns, for the life of *Matilda Webb Edwards*, in Trust for her separate use, with remainder to the use of *Small* during his life, with remainder to the use of the Children of the Marriage, as Tenants in Common in Fee, but in case they should all die under 21 and without having been married, and *Matilda Webb Edwards* should survive *Small*, to the use of her in Fee, but if *Small* should survive her, to the use of *Small* in Fee, and, if he should afterwards die Intestate seised of the Estates, to the use of *Ashford* in Fee: and that, in the intended Settlement, there

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v.

SMALL.

should be contained Powers enabling *Ashford*, after the decease of *Small* and *Matilda Webb Edwards*, to apply the Rents of the Estates for the Maintenance and Education of the Children during their Minorities; and, with the consent of *Small* and *Matilda Webb Edwards*, if living, and, after their deaths, at his own discretion, to raise not exceeding 1,000 *l.* for the Preferment of each Child, and, to mortgage the Estates for a Term of Years for raising the same; and (with the consent of *Small* and *Matilda Webb Edwards* or the Survivor) to sell the Timber on the Estates, and to invest the Money in Government or other Securities upon the like Trusts as were thereby declared; and, during the life of *Matilda Webb Edwards*, to lease the Estates for 21 Years in Possession; and also a like Power to *Small* when he should be in possession of the Estates: and that, in such Settlement so to be made as aforesaid, there should be likewise inserted and contained *all such Powers, Provisoes, Covenants, Clauses and Agreements as might, by Counsel, be considered essential for the Parties interested therein, or which might be proper for effecting the several Purposes therein mentioned*, and as were usually contained in Settlements of the like kind, notwithstanding they were not thereby directed or noticed.

The Marriage took effect; and *Small*, having borrowed 5,000 *l.*, in part of the 15,000 *l.*, from *Thomas Phillips*, by Indentures dated the 2d and 3d of March 1831, and by Fine, mortgaged the Estates, subject to the Life-Estate of *Martha Lucas*, to *Phillips* and his Heirs, for securing the repayment of the 5,000 *l.* with Interest: and, some time afterwards, *Martha Lucas* joined with *Small* in suffering a recovery of the Estates, to the use of *Phillips* in Fee, subject to her Life-Interest therein.

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v.

SMALL.

Small, having borrowed the further Sum of 5,000 *l.* from *Joseph Wakeford*, by Indentures of the 26th and 27th of October 1832, in exercise of the Power reserved to him by the Articles, to raise for his own benefit not exceeding 15,000 *l.*, mortgaged the Estates, subject to *Martha Lucas's* Life-Interest and to *Phillips's* Mortgage, to *Wakeford* and his Heirs, for securing the repayment of that 5,000 *l.* with Interest.

By Indentures of the 28th and 29th of October 1832, made between *Small*, *Ashford*, *Phillips* and *Wakeford*, and *Benjamin Russell Baker* and *Thomas Mann*, after reciting that, upon the Treaty for the Loan of the last-mentioned 5,000 *l.*, it was agreed that *Small* should make the Conveyance after-mentioned, the Estates were conveyed to *Baker* and *Mann* and their Heirs, subject to *Martha Lucas's* Life-Interest and to the Mortgages to *Phillips* and *Wakeford*, in Trust to sell, and, out of the Proceeds, to pay the Principal and Interest due to *Phillips* and *Wakeford*, and to pay the Surplus to *Small* or the other Person or Persons entitled thereto, for the time being, under the Articles.

Afterwards *Small*, in consideration of 1,000 *l.*, sold an Annuity of 110 *l.* to *Sarah Baker* for her life, and, for securing the payment thereof, by an Indenture (the date of which was not mentioned in the Bill) charged the Estates with the payment of the Annuity redeemable upon the Terms therein mentioned. *Small*, also, further charged the Estates with the payment of 2,500 *l.* and Interest to *T. Hawkins*.

Default having been made in payment of the Principal and Interest secured by the Mortgages, *Baker*

and *Mann*, on the 21st of December 1833, entered into and signed an Agreement, with the Plaintiff, to sell the Estates to him (subject to *Martha Lucas's* Life-Interest) for 19,250 *l.* and *Small*, subsequently, ratified and confirmed the Contract.

1834.
TASKER
v.
SMALL.

The Bill, which was filed against *Small* and his Wife, *Ashford*, and the Incumbrancers on the Estates, after stating as above, alleged that the 19,250 *l.*, far exceeded the amount at which *Small's* Reversionary Interest had been valued by two competent Valuers; that there was no Issue of the Marriage between *Small* and his Wife; that, since the execution of the Articles, *the Fee Simple and Inheritance of the Estates, had been duly conveyed to and vested in Phillips*, subject to *Martha Lucas's* Life-Interest; that the Plaintiff had been always ready to perform the Agreement, but *Small, Ashford, Baker* and *Mann* pretended that a good Title to the Estates free from Incumbrances except *Martha Lucas's* Life-Interest, could not be made. The Bill prayed that it might be declared that a good Title could be made to the Estates free from Incumbrances, except as aforesaid, and that the Contract might be specifically performed, and that *Small, Ashford, Baker* and *Mann*, might be decreed to do all necessary acts to convey the Estates to the Plaintiff accordingly, on payment of the 19,250 *l.*

Ashford and Mrs. *Small*, demurred, generally, to the Bill.

Mr. *Treslove* and Mr. *Coote*, in support of the Demurrer :

The Question turns on the construction which is to be

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SMALL.

put on the parenthetic words in the Articles: and it must be borne in mind that *Small's* Interest in the Estates, is Reversionary. *Small* covenants, with *Ashford*, to do all necessary acts for conveying the Estates to the uses upon the Trusts &c. of the Articles, subject to the raising of any Sum or Sums not exceeding 15,000 *l.*, by Mortgage, Annuity or otherwise, for his own use, and to the execution of any Deed or Deeds he might thereafter make for securing the repayment of such Sum or Sums and the Interest thereof. The Question is whether, under those words, he could, the day after the Articles were made, have sold the Estates for raising the 15,000 *l.*, and could have called on his Wife and *Ashford* to join in the Sale. The Articles, after directing the Estates to be settled on *Small* and his Wife and their Children, provide for the insertion, in the Settlement, of Powers for the Maintenance and Advancement of the Children, and for the granting of Leases and cutting Timber on the Estates. *Small* mortgaged the Estates, first, to *Phillips*, and, next, to *Wakeford*; and, afterwards, he joined in conveying the Estates to *Baker* and *Mann*, in Trust to sell and pay off the Principal and Interest due on the Mortgages, and then to pay the surplus Proceeds of the Sale to *Small*, his Heirs, Executors &c., or the other Person or Persons, for the time being, entitled thereto under the Articles. Afterwards, he sold an Annuity to *Sarah Baker*, and charged it on the Estates: and, then, he made a third Mortgage to *Hawkins*, to secure 2,500 *l.*

A Power of Sale does not arise on these Articles, either expressly or by implication. On the contrary, it appears from the whole tenor of the Articles, that the Parties intended that such a Power should not be inserted

in the Settlement. If the Parties meant that *Small* should have a Power of Sale, it is strange that they should say: "By Mortgage, Annuity or otherwise." The general word, *otherwise*, is governed by the preceding particular words. Moreover, the Estates are to be settled subject to any Deed or Deeds that *Small* might execute for securing the repayment of the Sums to be raised and the Interest thereof.

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[The *Vice-Chancellor*:—If the 15,000*l.* were raised by Annuity, how would you construct the Annuity-Deed?]

Small's Interest was Reversionary, and it is not usual to give a Power to sell such an Interest. If it is sold, Mrs. *Small* will come into possession of an Income immediately.

[The *Vice-Chancellor*:—If the Sale was not to take place until after the death of the Tenant for Life, why were the words: "at any time or times," inserted in the Articles?]

If *Small* had any Power of Sale, it did not authorize him to sell the whole of the Estates, nor, indeed to sell any part of them after making the Mortgages, nor could he delegate the Power.

Lastly: No Person ought to be made a Party to a Suit for Specific Performance, except those who were Parties to the Contract. Mrs. *Small*, therefore, ought not to have been made a Party to this Suit. The Prayer of the Bill is improper as against Persons who are not Parties to the Contract.

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T.
SMALL.

Sir *E. Sugden*, Mr. *Spence* and Mr. *K. Parker* appeared in support of the Bill.

But The VICE-CHANCELLOR, without hearing them, said :

The only point on which I have any doubt, is whether Mrs. *Small* ought to have been made a Party to this Suit.*

It appears, on the face of the Articles, to have been the primary object of the Settlor to secure to himself the 15,000 *l.*, and the Terms of the Deed are, I think, large enough to enable him to raise it by Sale.

The Deed recites that it was agreed, on the Treaty for the Marriage, that the Estates should, subject to the Estate for Life therein of *Martha Lucas*, and to the raising, by *Mortgage or otherwise*, of any Sum or Sums of Money not exceeding, in the whole, the Sum of 15,000 *l.*, by and for the said *A. G. Small*, be conveyed to the uses thereafter expressed. Then, when we come to the witnessing part, we find these words: "Subject and without prejudice to the raising, by any ways or means, and at any time or times he, the said *A. G. Small*, should think proper, of any Sum or Sums of Money not exceeding, in the whole, the Sum of 15,000 *l.*, by *Mortgage, Annuity or otherwise.*" The words "by Mortgage" do not imply a sale: the word

* The Counsel for the Demurrer said that they would waive the objection that Mrs. *Small* ought not to have been made a Party; their object being to obtain the Opinion of the Court on the principal Question. At the hearing of the Cause, however, (a Report of which is subjoined,) Counsel appeared for Mrs. *Small* separately, and the objection was again raised and strongly urged.

"Annuity" almost implies a Sale, as the raising of the Money by Annuity, is a more burdensome mode of raising it than a Mortgage is: then come the words, "or otherwise," which do imply a Sale. The words here used show an intention to increase the Power to raise the Money, as occasion should require.

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TASKER.
v.
SMALL.

I have no doubt upon the construction to be put on these words, and that they are sufficiently ample to enable Mr. *Small* to make a good Title to the Purchaser. The Demurrer, therefore, must be over-ruled.

THE Cause now came on to be heard. It was admitted that the Facts of the Case, as they appeared on the Bill, were not altered.

1836:
3rd & 4th June.

Mr. *Knight*, Mr. *Spence* and Mr. *K. Parker*, appeared for the Plaintiff.

Specific Per-
formance.
Parties.

Mr. *Treslove* and Mr. *Coote* for the Defendants *Small* and *Ashford*.

Though, in general, none but the Persons who sign the Contract ought to be Parties to a Bill for Specific Performance, yet a Purchaser may, under special circumstances, make other Persons who are interested in the Estate, Defendants to the Bill.

Mr. *Jacob* and Mr. *Willcock*, for the Defendant Mrs. *Small*, urged the same Objections as had been raised on the argument of the Demurrer.

Mr. *Girdlestone*, Jun., for the Defendants *Phillips*, *Hawkins* and *Sarah Baker*, said though *Phillips* had, by his Answer, submitted, on being paid his Principal, Interest and Costs, to execute such Conveyance and do such Acts as might be necessary, on his part, to carry the Agreement into effect, yet he ought not, in the face of the question which had been raised between Co-de-

Wm. 3 M & G. 65.

1836.

TASKER

v.

SMALL.

fendants, in the course of the Suit, to be ordered to convey the Estate, until it was settled who was entitled to it.

Mr. *Cooper* appeared for the Defendants, *Baker* and *Mann*.

The VICE-CHANCELLOR :

This Case appears to be free from difficulty.

The Case is this.—*Small* being Tenant in Tail in remainder, and, being about to marry, entered into the Articles in question. The Opinion that I expressed in deciding on the Demurrer, remains unaltered, namely, that it was competent to *Small* to sell the whole Estate for the purpose of raising the 15,000 *l*.

The recital in the Articles is &c. &c. So that the first object in dealing with the Estate, was that the 15,000 *l*. should be raised for *Small*. And then it was witnessed, &c. &c.

It was said that the general power expressed in the first part of the Deed, is to be limited to a Mortgage, because there are the words : “ Subject to any Deed or Deeds and Assurances which he might thereafter make and execute for securing the repayment of such Sum or Sums of Money and the Interest thereof.” But, inasmuch as it was expressly declared before, that the Settlement should be subject to his raising the 15,000 *l*. by Mortgage, Annuity or otherwise, it would be too much to say that the Power is to be cut down, because there is a foolish reference to the Deeds by which the raising of the 15,000 *l*. is to be effected. As the 15,000 *l*. is, in the opinion of the two Valuers, a large

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SMALL.

proportion of the value of the Estate, it is reasonable to suppose that the Parties intended that Mr. *Small* should have a power of raising that Sum by Sale, as there would be a greater facility of raising the Money by Sale, than by Mortgage: for, when Money is raised by Mortgage, the Person who lends the Money, always requires the Estate to be of considerably greater value than the Mortgage-money. *Primâ facie* it does not appear likely that any one would lend 15,000 *l.* on Mortgage of the Estate, the day after the Articles were executed. Therefore it would be idle to say that Mr. *Small* should have the power of raising the 15,000 *l.*, at any time, unless he had power to raise it by Sale. Then what is done? First he executes a Mortgage and levies a Fine to *Phillips*, for securing 5,000 *l.*, and then he mortgages the Equity of Redemption to *Wakeford*, for securing a further Sum of 5,000 *l.* Then there are two other Transactions, by one of which 2,500 *l.* was raised by Mortgage, and by the other 1,000 *l.* was raised by Annuity; so that 13,500 *l.* has been raised in the whole. If that were all, I should think it a matter of course that *Small*, having the power, might, with the concurrence of the Parties having the prior charges, sell the Equity of Redemption to raise the Sum mentioned in the Articles.

Mr. *Jacob* said that it was the duty of *Small* to keep down the Interest on the Sums which he has borrowed. A Tenant for Life is bound to keep down the Interest of an Incumbrance on the Estate, but that does not apply to the Case of a Tenant in Tail in remainder. He is not bound to do so, because there is no Fund to keep it down. As *Small* was empowered to raise the 15,000 *l.*, the Interest would be chargeable on the

1836.

TASKER

v.

SMALL.

Estate, as the object was that he should have the whole 15,000 *l.* to put in his pocket.

Then he ultimately executes certain Instruments by which he conveys the Equity of Redemption to *Baker* and *Mann*. That was a useless piece of machinery : but it was quite competent to him to employ them as his Agents in selling the Estate ; and, as he ratified the Contract, it was his Contract.

Tasker, having got the Contract, has a right to have it performed : and the legal Estate being in *Phillips*, he is not willing to convey it, point blank, to *Tasker*, but desires that if he does, he shall have competent authority for so doing. Then the Bill is filed ; and, as the question is raised whether the legal Estate can be so conveyed, Mrs. *Small* is, of necessity, made a party to the Suit. Therefore, on account of the hesitation of *Phillips* to reconvey the Estate, the Suit is rightly constructed by making Mrs. *Small* a party.

There must be a Declaration that it is competent to *Small* to sell the Fee Simple of the whole of the Estate to raise the 15,000 *l.*, and it must be referred to the *Master* to inquire whether the whole or what part of the 15,000 *l.* has been raised, and whether, at the time of the Contract, the Sum proposed to be given was a fit and proper Sum to be given.

POWYS v. MANSFIELD.

THE Judgment on the hearing of this Cause, was delivered on the 23d of February 1836 *; but the Minutes of the Decree were not finally arranged until the 27th of April. The Decree was dated on the last-mentioned day, and concluded in the following words: "And this Decree is to be binding on the said Defendant, *John Simeon*, the Infant, unless he, being served with a Subpœna to show Cause against the same, *shall, within six months after he shall attain his age of 21 years, show unto this Court good Cause to the contrary.*"

On the 8th of February 1836, the Defendant, *John Simeon*, who was the eldest Son of the Defendants, Sir *Richard* and Lady *Simeon*, attained 21: that fact, however, was not disclosed until the Notice of the present Motion was served.

A Motion was now made on behalf of the Defendant, *John Simeon*, That he, having attained his age of 21 Years, might be at liberty to put in a new and further Answer to the Plaintiff's Bill in this Cause, and that he might have Six Weeks' time given him for that purpose, and that, in case the Plaintiff should reply thereto, the Defendant, *John Simeon*, might be at liberty to examine Witnesses in support thereof, and that this Cause, on such Answer, with any Evidence which might be gone into in verification or support thereof, might be again set down and come on to be heard, and that, in the mean time all Proceedings under the Decree made on the hearing of the Cause, might be stayed.

* See ante, p. 528.

1836:
25th May and
1st June.

Practice.
Demurrer of
Parol.
Infant. Decree.

As the Demurrer of the Parol has been abolished by 11 Geo. 4, & 1 W. 4, c. 47, an Infant Defendant is not entitled to have Six Months given to him, after attaining 21, to show Cause against a Decree.

J. M. 2. 6. 157
J. M. 2. 669

1836.

POWYS
v.
MANSFIELD.

Sir C. Wetherell and Mr. Bethell, in support of the Motion, relied, principally, on *Kelsall v. Kelsall* (a). They also cited *Bennet v. Lee* (b), *Fountain v. Caine* (c), and *Napier v. Lady Effingham* (d); and said that Sir Richard Simeon was ready to pay, into Court, the Money directed to be raised by the Decree.

Mr. Knight, Mr. Jacob and Mr. Chandless for the Plaintiff, and the Defendant, his Infant Son :

In *Kelsall v. Kelsall*, the Defendant on whose behalf the Application was made, was an Heir-at-Law. But Mr. Simeon is not the Heir of either Sir John or Sir Fitzwilliam Barrington. It is not of course, after Decree, to allow a Defendant, on coming of age, to make a new Case. Nor, indeed, is it the Practice of the Court, except where a Decree is made against an Infant personally, (as in a Suit to foreclose a Mortgage, or to establish a Will,) to give the Infant Six Months after coming of age, to show Cause against the Decree. The reasoning of Lord Hardwicke, in *Bennet v. Lee*, shows that that indulgence will not be granted unless a special Case is made. The general rule is that an Infant Defendant, on coming of age, can only show Error in the Decree. *Williamson v. Gordon* (e). The Report of *Fountain v. Caine* is not very intelligible: for an Infant is never bound by the Answer of his Guardian.

In this Case, Evidence was given on behalf of the Infant. Has an Infant, on coming of Age, ever been allowed to make a new Case, where he has, himself, entered into Evidence? It would be pregnant with mischief to Property, if a Plaintiff could not obtain re-

(a) 2 Myl. & Keen, 409.

(d) 2 P. W. 401.

(b) 2 Atk. 487. 529.

(e) 19 Ves. 114.

(c) 1 P. W. 504.

jief against an Infant, except at the risk of having a new Case made, after all his evidence has been exposed. If an Infant's Case has been misconducted, he has his remedy against the Solicitor who acted for him.

1836.
POWYS
v.
MANSFIELD.

The Rule that an Infant, on coming of Age, may put in a new Answer, is stated, by Lord *Hardwicke*, in *Bennet v. Lee*, to be founded on the Practice of Courts of Law which allows the Parol to demur. By the 11 G. 4, & 1 W. 4, c. 47, s. 10, (which received the Royal Assent Three Years before the Bill in this Cause was filed) the Demurrer of the Parol is abolished. As the principle of the Rule has been abolished, the Rule itself no longer exists.

Besides, the Defendant, Mr. *Simeon*, came of Age on the 8th of February. Your Honor's Judgment was delivered on the 23d of that Month, and the Decree was drawn up on the 27th of April. So that the Defendant was adult long before the Decree was made. There is no Case in which a Defendant, who was an Infant at the institution of the Suit, has been allowed to make a new Defence, where the Decree was made after the Infant came of Age.

The VICE-CHANCELLOR:

In this Case the Decree ought to be considered as having been made on the 27th of April, for it was not until then that the Terms of it were finally settled. So that the Decree was made after the Defendant had attained 21.

In all the Cases that have been cited, and, also, in a Case in *Moseley (f)*, the Defendant was an Infant when

(f) Anon. Mos. 66.

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the Decree was pronounced ; and that fact is referred to by the Judges who decided those Cases.

Here, however, the Defendant on whose behalf the Application is made, was adult when the Decree was pronounced : and, moreover, that Decree was absolute. I say *absolute*, for the giving to the Defendant, who had attained 21, Six Months, "*after he shall attain 21,*" to show cause against the Decree, was giving him an impossible day. No one ever supposed that the Application could be made, after an absolute Decree had been pronounced.

I wish, however, this Motion to stand over, in order that it may be ascertained whether there is any instance of the Application being granted, where the Defendant was adult when the Decree was pronounced.

1st June.

Sir *Charles Wetherell* having said that he had not been able to find any further Authority, The *Vice-Chancellor* delivered Judgment as follows :

The Case remains in the position in which it was left a Week ago. I have thought of it, a good deal, since ; and have also taken the opportunity of mentioning the general point, which arises upon the 11 G. 4, & 1 W. 4, c. 47, both to The *Lord Chancellor* and The *Master of the Rolls*, and they agree with me in thinking that the plain meaning of that Statute was that the Parol should not demur, and, as a necessary consequence, that the Six Months should not be given in a Decree, by reason of a Defendant being an Infant ; because the giving of the Six Months, was founded on the circumstance that, in certain cases the Parol has demurred : and it was properly

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observed, by Mr. *Jacob*, in the course of the Argument, that it is not a general proposition that, in every case in which an Infant is a Defendant, the Six Months were given by the old Practice; but the Six Months were given by Decrees in this Court which would have, in their operation, an effect similar to that which would take place in cases at Law, where the Parol would demur.

By the express language of the 10th Section of the Act, it is declared that: "Where any Action, Suit or other proceeding for the payment of Debts, or any other purposes, shall be commenced or prosecuted by or against any Infant under the Age of 21 Years, either alone or together with any other person or persons, the Parol shall not Demur; but such Action, Suit or other proceeding shall be prosecuted and carried on, in the same manner and as effectually as any Action or Suit could, before the passing of this Act, be carried on or prosecuted by or against any Infant, where, according to Law, the Parol did not Demur." And then the 11th Section directs: "That, where any Suit hath been or shall be instituted in any Court of Equity for the payment of any Debts of any person or persons deceased, to which their Heir or Heirs, Devisee or Devisees, may be subject or liable, and such Court of Equity shall Decree the Estates liable to such Debts, or any of them, to be sold for satisfaction of such Debt or Debts, and, by reason of the infancy of any such Heir or Heirs, Devisee or Devisees, an immediate Conveyance thereof cannot, as the Law at present stands, be compelled, in every such case such Court shall direct, and, if necessary, compel such Infant or Infants to convey such Estates so to be sold (by

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all proper Assurances in the Law) to the Purchaser or Purchasers thereof, and in such manner as the said Court shall think proper and direct; and every such Infant shall make such Conveyance accordingly; and every such Conveyance shall be as valid and effectual, to all intents and purposes, as if such person or persons, being an Infant or Infants, was or were, at the time of executing the same, of the full Age of 21 Years." It is clear, therefore, upon these Sections, that the meaning of the Statute was that, where there is a Decree which affects the Real Estate of an Infant, if the Court thinks right to make a Decree, the Court is to follow up that Decree by ordering Conveyances to be made, which the Statute directs to be as valid as if the Infant was of the Age of 21 Years. There is no doubt, in my Opinion, that the saving of the Six Months is virtually abolished; and in that Opinion, as I said before, The Lord Chancellor and The Master of the Rolls agree.

Then how does this Case stand?—The Decree was pronounced after the Infant had attained the Age of 21 Years; and I before adverted to the peculiar language contained in this Decree, which is so constructed that though, apparently, it gave the Six Months to the Infant, yet, in fact, it has not done so.

In none of the Cases which have been cited, was the application, by the Infant, to make a new Defence, made after the Decree had been made absolute; but, in all those Cases, either the application was made during the Infancy of the Defendant, or after he had attained 21, but before the Decree had been made absolute. Now, in this Case, both those circumstances are wanting: for the Application is made by the Defendant after

See how & Hobs
18 line 181

he has attained 21, and after the Decree is absolute, (because the saving that is contained in this Decree, goes for nothing :) and, moreover, the Decree was pronounced after the Defendant had attained 21.

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It seems to me, therefore, that neither the Precedents which have been quoted, nor the state of the Law as it ought to be taken to be after the passing of the Act to which I have alluded, justify the Application; and, therefore, it must be refused; and, as it is an experimental Application, it must be refused with Costs.

GASKELL v. GASKELL.

1836:
18th and 19th
March.

UNDER the Will of *James Milnes*, the Plaintiff was Tenant for Life, with remainders to his first and other Sons, successively, in Tail, of an undivided Moiety of certain Estates; and the Defendant, *Benjamin Gaskell*, was Tenant for Life, with remainders to his first and other Sons successively in Tail, of the other undivided Moiety of the same Estates. The Plaintiff had no Issue. *Benjamin Gaskell* had Issue one Son, the Defendant, *James Milnes Gaskell*, who was Adult. The Plaintiff and the Defendants having entered into an Agreement to make Partition of the Estates, the Bill prayed that a Partition might be made according to the Agreement, or in such other manner as to the Court should seem meet, and that the entirety of such of the Estates as should be allotted to the Plaintiff, might be conveyed to the same uses as the undivided Moiety limited, by the Will, to the use of the Plaintiff and his Sons, was then subject to, and that the entirety of the

Partition.
Tenant for Life.

A Tenant for Life of an undivided Share of an Estate, with Remainders to his unborn Sons in Tail, may file a Bill for a Partition; and the Decree will be binding on the Sons when in esse.

4 B. & M. 117

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Residue of the Estates might be conveyed to the same uses as the other undivided Moiety was then subject to; and, if necessary, that a Commission of Partition might Issue for carrying the Agreement into execution; and that all necessary Parties might be ordered to join in executing proper Conveyances, and doing all acts necessary for the purposes aforesaid.

The Cause having come on to be heard,

Mr. *Wigram* and Mr. *Grubb*, for the Plaintiff, said that doubts had been entertained whether, in a Suit for a Partition instituted by a person who was Tenant for Life only, a Decree could be made which would be binding on the persons in Remainder.

Mr. *Duckworth* for the Defendants.

The *Vice-Chancellor* said he would consider the point.

19th March.

On this day His Honor said that, in *Martyn v. Perryman* (a) the Court decreed a Partition, notwithstanding *Femes Covertes*, Infants and Incumbrancers, were concerned: that, in *Lord Brook v. Lord Hertford* (b) the Court seemed to think that there might be some difficulty where one Party was Tenant for Life; but the Court had frequently decreed a Partition, where the Tenant for Life was a Defendant; that the manner in which the Parties were arranged could make no difference, and, therefore, that, in this Case, the Partition might very well be carried into effect, notwithstanding the Plaintiff was Tenant for Life only; but it must be referred to The *Master* to inquire and state whether it

(a) Rep. Ch. 125.

(b) 2 P. W. 518.

would be for the benefit of the future Issue of the Plaintiff, that the Agreement, either without variations or with any and what variations, should be carried into execution.

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GASKELL
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GASKELL.

EX PARTE PAYNE.

ANN HUNTINGDON, being seised of several Mortgages in Fee, by her Will gave One-Half of all her Property to her Grand-Niece, *Ann Huntingdon Ascroft*, and the other Half, to her Nephews, Nieces and Brother, and appointed *J. M. Payne* and *S. Johnson* her Executors. The Testatrix left *Ann Huntingdon Ascroft*, and one Brother and nine Nephews and Nieces, one of whom was *Maria* the Wife of *John Ascroft*, her surviving.

1836:
23d April.

Trustee.
Construction of
11 Geo. 4, and
1 W. 4, c. 60.

The Devisee of a Mortgage is not a Trustee for the Executors of the Testator, within 11 Geo. 4, & 1 W. 4, c. 60.

see 1 & 2 Inst. 69

In pursuance of an Arrangement made between the Executors and the Parties entitled to the Equity of Redemption of the *mortgaged Premises*, and, as it was alleged, with the concurrence of the Devisees, the Executors caused Deeds of Lease and Release to be prepared, whereby the mortgaged Premises were expressed to be conveyed, by the Devisees, to *W. Bird in fee*, in Trust for the Executors and to be conveyed as they should direct on payment of the Principal and Interest due thereon respectively. Mr. and Mrs. *Ascroft* having refused to execute the Deeds, the Executors presented a petition, under 11 Geo. 4, and 1 W. 4, chap. 60, praying that some person might be appointed to convey the Premises, to *Bird*, in the place of Mr. and Mrs. *Ascroft*.

Mr. *Knight* and Mr. *K. Parker*, for the Petitioners, said that the Petition was presented under the 8th

1836.

Ex Parte
PAYNE.

Section of the Act, in consequence of Mr. and Mrs. *Ascroft* having refused to execute the Conveyance.

Mr. *Jacob*, for Mr. and Mrs. *Ascroft*:

The 8th Section applies to Trustees, and to Cases where the Party has, for 28 days, refused to execute a *proper* Deed. Mortgages as well as Trusts are mentioned in the 6th and 7th Sections; but Trusts only are mentioned in the 8th Section: therefore, that Section was not intended to apply to Mortgages. *In Re Goddard* (a); *In Re Stanley* (b).

The Conveyance to *Bird* was not a *proper* Deed; for it was not such a Deed as Mr. and Mrs. *Ascroft* could be required to execute. The Executors ought to have received the Money due on the Mortgages, and then my Clients would have been bound to re-convey the Estates to the Mortgageors; but they are not bound to transfer the Estates to a Trustee appointed by the Executors. Besides Mrs. *Ascroft* has a beneficial Interest in a Portion of the Property.

Mr. *Knight*, in reply:

It has been repeatedly decided that the Heir or Devisee of a Mortgagee, is a Trustee for the Persons entitled to the Mortgagee's Personal Estate. The Cases cited do not apply; for, in those Cases the question did not turn on the character of the Heir, but of the Intestate; it was the Heir of the Mortgagee who could not be found: and a Conveyance cannot be obtained where an Heir cannot be found, unless he be the Heir of a

(a) 1 Myl. and Keen, 25. (b) *Ante*, Vol. V. p. 320.

1836.

Ex Parte
PAYNE.

Trustee. If Mrs. *Huntingdon* had died Intestate, and her Heir could not be found, then this Case would have been similar to the Cases referred to : but she has devised the Legal Estate to Persons who have become Trustees for the Parties entitled to her Personal Estate.

By the 18th Section Constructive Trusts are positively declared to be within the Act.

[The *Vice-Chancellor* :—Is the Heir of a Mortgagee more a Trustee for the Executor, than he is for the Mortgagor, where the Mortgage-money has been paid off?]

If the Mortgage-money had been paid off in the lifetime of the Mortgagee, the Heir would have been a Trustee for the Mortgagor.

THE VICE-CHANCELLOR :

The Question in this Case, is whether Mrs. *Ascroft* is a Trustee for the Executors of the Testatrix, within the meaning of the 8th Section of the Act.

In the 6th and 7th, and in some of the other Sections, the words *Trust* and *Mortgage* are both used ; but, the word *Mortgage* is not found in the 8th Section. It is clear, therefore, on the face of the Act, that the Legislature meant to make a marked distinction between a Trustee and a Mortgagee.

By the 18th Section it is declared that the Provisions of the Act shall extend to Cases of Constructive Trust ; but I apprehend that that Section was not meant to extend the Provisions of the Act to any Case of Trust to which the 8th Section was intended not to apply ;

1836.

Ex Parte
PAYNE.

and as the 8th Section was intended not to apply to the Case of a Mortgagee, the 18th Section does not make it have that application.

Mr. *Jemmett*, in his Second Edition of Sir *Edwara Sugden's Acts* (c) makes this observation on The Reporter's Note to the Case, *In re Goddard*: "The Reporter, in a Note to the above Decision, adds, 'the Case in question seems to be *casus omissus* in the Act.' But this is not so: the Case of a Mortgagee was intentionally distinguished, in this respect, from that of a mere Trustee, by the framer of the Act, and was purposely omitted from the operation of this Section, through fear of the mischiefs that might occur by too hastily disposing of the Interest of Mortgagees, under the idea of their being merely Trustees." If any Case were wanting to illustrate the object which Sir *E. Sugden* had in view when he framed the 8th Section of the Act, this Case would have illustrated it. It is plain that the Parties refusing to execute the Conveyance, have a beneficial Interest, as well as a Trust in one sense of the word.

My Opinion is that this is not a Case within the 8th Section of the Act.

(c) See page 151.

AN
I N D E X
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P R I N C I P A L M A T T E R S.

ACCOUNT.

. By articles of partnership, it was agreed that just and true accounts should be made out, half-yearly, and signed by the partners, and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners; and, after the death of two of the other partners, it was discovered that the accounts were fraudulent. Held that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. [*Oldaker v. Lavender*] - - - 239

2. A. conveyed his estates to B., in trust to sell and pay off a mortgage and other incumbrances on the estates, and to retain a debt due to B., and until the sale, to apply the rents in keeping down the interest on the charges, and to pay the surplus to A. B. took a transfer of the mortgage, and entered into and re-

mained in possession for 24 years, but did not sell the estates. For the first 10 years the rents were less than the interest; but, afterwards, they exceeded it. A. filed a bill for an account of the rents received by B., with yearly rests, and for a reconveyance of the estates. But the court refused to direct the rests. [*Latter v. Dashwood*] - - - 462

See ACQUIESCENCE.—MULTIFARIOUSNESS.—PLEA AND PLEADING, 8.—REPORT.—VOLUNTARY DEED.—

ACCUMULATION.

See ALIENATION.

ACQUIESCENCE.

If a person interested under a will, files a bill for an account, against the executors, not seeking to charge them for wilful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of, were known to the deceased plaintiff. [*Garrett v. Noble*] - - - 504

ADEMPTION.

1. Testator gave, to his wife, his house in B., and the furniture in the said house. The lease of the house expired in the testator's lifetime, and he took another house and removed his furniture to it. Held that the legacy was adeemed. [*Colleton v. Garth*] - - - - - 19
2. Testator bequeathed 7,000*l.* secured on mortgage of an estate at W., belonging to R.T. The 7,000*l.* and interest were received, after the date of the will, by the testator's agent on his account, and, immediately afterwards, 6,000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount. Held that the legacy was specific, and, notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. [*Gardner v. Hatton*] - - - - - 93

ADMINISTRATION.

See COVENANT, 2.—EXECUTOR.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

1. The proprietors of Covent Garden Theatre agreed, with an actor, that he should act for 24 nights during a certain period of time at their theatre, and that, in the meantime,

he should not act at any other place in London. Held that the court cannot enforce the positive part of the contract, and therefore it will not restrain, by injunction, a breach of the negative part. [*Kemble v. Kean*] - - - - - 333

2. Where a party agrees not to do a particular act, and there are other terms in the agreement which are so vague that the court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. [*Kimberley v. Jennings*] - - - - - 340
3. The court will not give any assistance to a party seeking to enforce a hard bargain - - - - - [*Ibid.*]
See PARTIES.

ALIENATION.

Testator devised his estates to trustees, in trust to pay, out of the rents, 300*l.* a year for the maintenance of his son's children, and to pay the surplus rents to his son during his life, for the maintenance of himself and his family; but so as he should not have any power to charge or alienate the same: provided that if his son should in any manner, impede or frustrate the trusts of the will, then the surplus rents should be no longer paid to him, but should be accumulated by the trustees, for the benefit of the son's children. The son conveyed his interest under the will to trustees for his creditors. Held that, thereupon, the trust for accumulation, took effect. [*Lewes v. Lewes*]

AMENDMENT.

A bill was filed against two trustees, alleging that one of them only had acted in the trusts, and seeking to charge that trustee only with a breach of trust. The trustees in their answer admitted that they had both acted in the trusts. The plaintiffs, however, did not amend their bill. Held that they were nevertheless entitled to charge both the trustees with the loss occasioned by the breach of trust. [*Taylor v. Tabrum*] - - - - - 281

ANNUAL RESTS.

See ACCOUNT, 2.

ANNUITY.

Testator gave an annuity, payable half-yearly, to his son for his maintenance and education until he attained 21, and another annuity, payable in like manner, to his daughter, (who was adult) during the son's minority. Held that, as the son was entitled to a proportional part of his annuity, from the last half-yearly day of payment up to his attaining 21, the daughter was entitled to a like proportional part of her annuity. [*Weigall v. Brome*] 99

See CHARGE ON BENEFICE. — CONSTRUCTION, 23—25.—COVENANT, 2.

ANSWER.

See EXCEPTIONS, 1, 3.—PLEA AND PLEADING, 3.

APPLICATION OF PURCHASE-MONEY.

See PURCHASER, 3.

APPLICATION OF PAYMENTS.

See DEBTOR AND CREDITOR, 4.

APPOINTMENT.

See CONSTRUCTION, 18. — PROBATE DUTY.—VENDOR AND PURCHASER, 4

APPORTIONMENT.

See ANNUITY.—CONSTRUCTION, 9.

ASSETS,

See CONSTRUCTION, 2.—COVENANT, 2. EXECUTOR, 4.

ASSIGNMENT.

See VOLUNTARY DEED.

ATTACHMENT.

1. A defendant who had been taken on an attachment for want of appearance, was discharged, under 11 Geo. 4 and 1 Will. 4, c. 36, before plaintiff got an appearance entered for her. Held that, though a fresh subpoena might be issued against the defendant, no attachment could be taken out upon it. [*Williams v. Townshend*] - - 296
2. The defendant's time for answering having expired, the plaintiff's clerk in court gave notice, on a Saturday, that he must attach the defendant at the next private seal, which was on Monday following: and, on that day, the plaintiff sealed an attachment. On the same day, the defendant, not knowing that the attachment had been sealed, applied for an order for time, and gave notice, to the plaintiff's clerk in court, that he had done so. The attachment

was discharged without costs, as the defendant had used due diligence in obtaining the order for time. [*Taylor v. Fisher*] - - - - - 568

See PRACTICE, 16.

BALANCE OF ACCOUNT.

See DEBTOR AND CREDITOR, 4.

BANK OF ENGLAND.

To a bill for a discovery of stock standing in the name of the plaintiff's late father, either alone or jointly, for 20 years before and at his death, and for an inspection of the Bank books containing the entries of such stock, the Bank, in their answer, set forth an account of the stock, but declined to set forth a list of the books containing the entries. Held that they were not exempted from the production of their books, and, therefore, ought to set forth a list of them. [*Heslop v. The Bank of England*] - - 192

BANKRUPT.

1. C. brought an action against F., in the Lord Mayor's Court, for the recovery of a debt, and issued an attachment against B., who had in his hands funds belonging to F. W. filed a bill against C., B. and F., claiming a lien on the funds, and obtained an injunction, *ex parte*, to restrain proceedings in the action. Whilst the injunction was in force, F. became bankrupt. Held that though C. might, but for the injunction, have sued out execution long before F. became bankrupt, yet he was not entitled to be paid other-

wise than rateably with the other creditors. [*Ullock v. Barber*] - 300

2. A., on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A. on behalf of the owner, a certain sum, for freight of the ship, by two instalments, one to be paid on the sailing of the ship, and the other, on the completion of the voyage. The owner being indebted to C., ordered, in writing, A. to pay to C. all monies he might receive under the charter-party; and, accordingly, A. paid over the first instalment to C. The owner then assigned, by deed, the remainder of the freight to C., who gave notice of the assignment to A., but not to B. The vessel completed her voyage, and afterwards the owner became bankrupt. Held that the remainder of the freight was not in his order and disposition at his bankruptcy. [*Gardner v. Lachlan*] - - - - - 407

3. A. assigned 800*l.* to trustees in trust, during the life of B. or such part thereof as they should think proper, or at such other times and in such portions as they should judge expedient, to pay the interest to him, or, if they should think fit, to lay it out in procuring for him diet and other necessities, but so that he should not have any right to the interest other than the trustees, in their uncontrolled discretion, should think proper, and so as no creditor of his should have any claim thereon, nor should the same be subject to his debts, disposition or engagements: and it was declared that, after his death, the 800*l.*, and all savings

and accumulations of interest, if any, should be in trust for his children, and, if he should have no child, then in trust for C. B. became bankrupt. The trustees had paid him the interest down to his bankruptcy. Held that the life interest passed to his assignees. [*Snowdon v. Dales*]

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BENEFICE, CHARGE ON.

See CHARGE ON BENEFICE.

BIDDINGS.

See OPENING BIDDINGS.

BILL OF DISCOVERY.

1. A bill praying discovery, and concluding with the prayer for general relief, is a bill for relief. [*Angell v. Westcombe*] - - - - 80
2. A bill of discovery is demurrable, if the words "stand to and abide such order and decree therein" are inserted in the prayer of process. [*James v. Herriott*] - - - - 428

See CROSS BILL.

BILL OF REVIVOR.

See ACQUIESCENCE.

BREACH OF CONTRACT.

See AGREEMENT.

BREACH OF TRUST.

See PLAINTIFF.—TRUSTEE AND CESTUI QUE TRUST.

CAUSE AND CROSS CAUSE.

- A. filed a bill against B., which B. answered, and then filed a cross-bill against A. A., not having an-

swered the cross-bill, B. issued an attachment against him, but was unable to serve it, as A. was resident abroad. A. proceeded to examine witnesses in his cause. The court, on the application of B., ordered publication not to pass in A.'s suit, until he should have put in his answer and cleared his contempt in B.'s suit, and the court should order publication to pass. [*Palmer v. Leicester*] - - - - - 610

CERTIFICATE.

See EXCEPTIONS, 2.

CHARGE ON BENEFICE.

A vicar, whilst the 13th Eliz. c. 20, against charging benefices, was repealed, charged his living with an annuity, and covenanted, if he should exchange his living, to secure the annuity by charging and demising the new living, and, that in the meantime, it should be charged with the annuity. He afterwards exchanged his living, but did not execute any deed until after the revival of the 13th Eliz. Held that the covenant was a subsisting charge on the new living, and a receiver was appointed to provide for the annuity. [*Metcalfe v. The Archbishop of York*] - - - - - 224

CHARITY.

A testator devised his real estate, to trustees, in trust to dispose of the rents for the benefit of the poor of the city of R. and the limits and precincts thereof. The trustees having applied the rents for the benefit of the poor of one only of the parishes in the city, an information

was filed on behalf of two other parishes, claiming to participate in the charity, and a decree was made in 1680, directing that the rents should, for ever thereafter, be divided amongst the three parishes in certain proportions. In 1808 an information was filed on behalf of a fourth parish, for a similar purpose; and that parish was decreed to be entitled to a share of the rents, in the proportion of its extent and population to the extent and population of the three other parishes; but the proportions, as between those parishes, were not to be altered. An information was afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents, on account of its population having increased more than the population of the other parishes. But the information was dismissed, the decree of 1680 being final. [*The Attorney General v. The Mayor of Rochester*]

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See NEW ORDERS, 1.

CHARTER PARTY.

See BANKRUPT, 2.

CLERGYMAN.

See CHARGE ON BENEFICE.

COMMISSION TO EXAMINE WITNESSES.

Commission to examine witnesses at Madras, directed to the judges of the supreme court there. [*Murray v. Lawford*] - - - - - 573

See NEW ORDERS, 2, 5.—PRACTICE, 13.
WITNESS, 2.

COMPENSATION.

See INJUNCTION, 2.

CONCEALMENT.

See FRAUD, 2.

CONFIRMATION OF REPORT.

See PRACTICE, 3.

CONSENT OF CREDITORS.

See PLEA AND PLEADING, 2.

CONSENT TO MARRIAGE.

Testator directed his trustees to pay, to his daughters, their portions, on their marrying with the consent, in writing, of his trustees first had and obtained; and, on their marrying without such consent, that the trustees should stand possessed of their fortunes, in trust for their separate use for life, with remainder to their children. A. proposed to the trustees to marry one of the daughters, who was an infant. The terms, as communicated to her by one of the trustees, were that 500*l.* should be paid to A. on his marriage, out of her portion, and that the remainder should be invested, in the names of trustees, for her sole use and benefit, the interest to be paid to her only. The daughter accepted the proposals, and asked the consent of the trustees. The same trustee then wrote a letter to the daughter, saying that he and his co-trustee had not then signed the consent, but were ready to do so as soon as requisite: and a draft was prepared by which (subject to the payment of the 500*l.* to the husband) the portion was settled on the intended

husband during his solvency, then on the intended wife for her separate use for life, with remainder to the children, with remainder to the survivor of the intended husband and wife. A., having made certain arrangements for the disposal of the 500*l.*, which the trustees disapproved of, the trustee who had written the letter, refused to look at the draft of the settlement, saying he should expect A. to make some other proposals respecting the disposal of the 500*l.* Another arrangement was, accordingly, made and communicated to the trustee, but he took no notice of it, and his name was struck out of the settlement; and the marriage (to which his co-trustee had duly consented) was had without further communication with him. Held that the letter was a sufficient consent on his part to the marriage. [*Le Jeune v. Budd.*] - - - - - 441

CONSTRUCTION.

1. A testator domiciled in Jamaica, became, during a temporary residence at Frankfort, engaged and betrothed to a lady; and, by a codicil to his will, after mentioning her by name and alluding to his intended marriage with her, he gave 3,000*l.* to his wife. During the engagement, but before the marriage, the testator died. Held that the lady was entitled to the legacy. [*Schloss v. Stiebel*] - - - - - 1
2. A rent-charge expressed to be for a jointure, and in lieu of dower and thirds at common law, does not bar the jointress of her distributive

- share in her husband's undisposed of personal estate. [*Colleton v. Garth*] - - - - - 19
3. The word "representatives" in a will, construed to mean "descendants," the context requiring it. [*Styth v. Monro*] - - - - - 49
 4. Testator bequeathed the remainder of his property to his sister A. B., to dispose of amongst her children as she might think proper. Held that A. B. took no interest in the residue. [*Blakeney v. Blakeney*] - 52
 5. Testatrix devised all her messuages situate in Denmark-court. She had five houses situate in the court, and another which fronted towards the Strand and formed one side of a covered passage leading to the place where the five were situate, and which had attached to the back of it an outbuilding abutting on ground in Denmark-court. Held that the five houses only passed. [*Newton v. Lucas*] - - - - - 54
 6. A testator, after giving specific and pecuniary legacies, willed that A. and B. should divide, equally, any monies which might remain to his account after payment of his debts and pecuniary legacies. The testator, at the date of his will and at his death, had money accounts subsisting between him and his bankers and other persons. Held that the bequest did not pass his residuary estate but only the balances due on those accounts, subject to the debts and legacies. [*Hastings v. Hane*] - - - - - 67
 7. By a Scotch settlement a sum of stock was settled on the husband and wife for their lives, and, after

- the death of the survivor, on their children, and, failing children, on the nearest heirs of the wife: and she was empowered, at any time in her life, and even on death bed, to bequeath or dispose of the stock to any person, and in any manner she might think proper. Held that the power was not intended to be available, except in the event of there being a failure of children of the marriage. [*Peddie v. Peddie*] 78
8. A testator seised of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate whatsoever and wheresoever." Held that the copyholds and leaseholds for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them. [*Weigall v. Brome*] - 99
9. Testator gave to his son, in case he should live to attain 21, such part of his real estate as his son should choose, but not exceeding the yearly value of 350*l.*, and, to his daughter, such part of his real estate as should remain after his son should have made his choice, or of the whole of his real estate, in case his son should not live to choose his part, as she should choose, but not exceeding the yearly value of 360*l.* Held that the son was entitled to priority of choice on attaining 21, and that there was to be no apportionment, although he might not leave for the daughter lands of the yearly value of 360*l.* [*Ibid.*] - - - - - 99
10. A testator, after several devises and bequests, gave, devised and bequeathed all his messuages, chatels real, ready money, securities for money, debts and personal estate to A. and B., their heirs, executors, administrators and assigns, upon certain trusts. Held that the legal estate in premises mortgaged to the testator in fee, passed to A. and B., the trusts declared not being repugnant to that construction. [*Mather v. Thomas*] 115
11. Testator directed the interest of 10,000*l.* to be for the separate use of his daughter, Jane Lane, the wife of J. Lane, for her life, free from the debts of her husband. The husband died, and his widow married again. Held that the trust for the separate use, ceased on the death of the first husband. [*Benson v. Benson*] - - - - - 126
12. Testator gave 450*l.* to trustees, their executors, &c., in trust for his son for life, and after his son's decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the legal representatives of his son. And he gave the residue of his personal estate, to his son, his executors, &c. Held that the words legal representatives, meant next of kin. [*Walter v. Makin*] - - - - - 148
13. Testator directed his real estates to be settled on certain persons in strict settlement, and that there should be inserted in the settlement so to be made powers of leasing, sale, partition, and exchange. "And my will is, that in such intended settlement shall be inserted all such other proper and reasonable powers as are usually inserted in settlements of the like nature." Held that a power to appoint new trus-

- tees, was a proper and reasonable power to be inserted in the settlement. [*Lindow v. Fleetwood*] 152
14. Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews George and Charles, and the principal to be applied either in binding them apprentices at the age of 14, or to be reserved till they attained 21 to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under 21. Held that James and Henry were entitled to the residue. [*Prestwidge v. Groombridge*] - - - - - 171
15. Testator directed his trustees to sell his real and personal estate, and to apply the produce in paying his debts and the legacies thereafter given. The testator afterwards gave legacies by codicils, one of which was duly attested. Held that only the legacies in the will were payable out of the real estate. [*Strong v. Ingram*] - - - - - 197
16. Testator, after directing all his debts to be fully paid, devised his real estates to several different persons, and charged certain of them with specific sums. Held that those estates, as well as the others, were charged with the debts. [*Taylor v. Taylor*] - - - - - 246
17. Testator bequeathed a sum of 6,000*l.* in trust for his daughter for life, and, on her decease, "I give the
- said 6,000*l.* to the children, or their descendants, of T. F., in such proportions to each as my daughter may direct." The daughter died without having made any appointment. Held that the children of T. F. were entitled to the fund, to the exclusion of their issue. [*Jones v. Torin*] - - - - - 255
18. Testatrix gave a weekly sum to A. for his life, or until he should attempt to assign, &c. the same, and she directed a sum of stock to be set apart to answer the payments; and she gave to A. the power of leaving the stock, after the payments to him should cease, to and for the benefit of his wife and children, as he should, by will duly executed, give and bequeath the same. A. died, having made an invalid appointment of the stock. Held that there was an implied gift to his wife and children in default of appointment. [*Brown v. Pocock*] 237
19. Testator gave a sum of stock to his wife, for life, and, after her death, to his sons and daughter: and he directed the interest of his daughter's share, to be paid to her, for her separate use, for life, and, at her decease, the capital to be divided amongst such children as she should have living at his decease, the shares of sons to be paid at 21, and of daughters at 21 or marriage, provided their mother was then dead, otherwise her children's shares were not to be paid to them until her decease; but, if the testator's daughter had no children living at her decease, her share was to be equally divided amongst such of his

sons as should be then living; and, if any of his said sons and daughter should die before his wife, and without leaving issue, their shares to be divided among his other children. Held that the daughter's children living at the testator's death took absolute vested interests at 21, though their mother was still living; and that her interest in the share of one of the testator's sons who died in the lifetime of his widow was not subject to the same trusts as her original share, but vested in her absolutely. [*Gibbons v. Langdon*] - - - - - 260

20. By a marriage settlement, estates were limited to the wife and the husband, for their lives, with remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and if more children than one, equally to be divided among them as tenants in common: and, for default of such issue, to the wife and her heirs. Held that the husband did not take an estate in tail special, but for life only, and that the children took by purchase as tenants in common in fee in remainder. [*North v. Martin*] 266

21. Testator devised an estate to trustees, in trust for R. T. for life, and, after the death of R. T., in trust to convey the estate unto, between or amongst all and every, and such one or more of the child or children of R. T. who should be living at his decease, and the issue of such of them as should be then dead leaving issue, such issue to take, between or amongst them, the share which their parent or parents would

have been entitled to if then living. R. T. survived the testator, and died leaving several children and the issue of another child who was dead at the date of the will. Held that such issue were entitled to take, amongst them, an equal share of the estate with the surviving children. [*Tytherleigh v. Harbin*] - - 329

22. Testator devised an estate to A. for life, remainder to trustees to preserve, &c. remainder to all the children of A. as tenants in common and not as joint tenants, and, for want of such issue, to B. for life, remainder to trustees to preserve, &c. remainder to all the children of B. as tenants in common and not as joint tenants, and, for want of such issue, to C. in fee. Held that the children of A. took estates for life, with cross-remainders between them, for life, with remainder to B. for life, with remainder to her children as tenants in common, with cross-remainders between them for life, with remainder to C. in fee. [*Ashley v. Ashley*] - - 358

23. Testator, by his will, gave an annuity to his daughter out of certain estates for her separate use. By a codicil, he gave her a life estate for her separate use in the same estates. Held that the daughter was entitled to the life estate only. [*Graves v. Hicks*] - - - - - 391

24. Testator charged his estates with an annuity in favour of his wife, and, subject thereto, he devised the estates in strict settlement. Afterwards by his will and codicils, he charged the estates with several annuities to his wife and other per-

- sons. Held that the first-mentioned annuity was the primary charge on the estates. [*Ibid.*] 391
25. Testator devised an estate to his daughter for life, with remainder to her husband for life, and charged other estates with the payment of an annuity to his daughter, and, after her death, with the payment of an annuity to her husband. He then made a codicil which, in effect, revoked the husband's life estate in remainder. By a subsequent codicil, he gave, to the husband, a life estate in possession in the first estate, and also an annuity in possession, to the same amount, and charged upon the same estates as the former annuity. Held that the second annuity was substituted for the first. [*Ibid.*] - - - 391
26. Testator gave the interest of a fund to his wife for life, and, after her death, to such of his four daughters as should be then living, in equal shares during their respective lives; and, from and after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child. Held that the child became entitled, on the widow's death, to have one-fourth of the capital transferred to her. [*Woodstock v. Shillito*] - - - 416
27. Testator bequeathed 5,000*l.*, to A., if he attained 21, but if he should not attain that age or die without leaving issue male, then over. Held that the 5,000*l.* vested, absolutely, in A. on his attaining 21. [*Mytton v. Boodle*] - - - 457
28. Where a decree in a cause in which previous references have been made, directs a reference to the Master in rotation, the decree will be carried to the Master to whom the previous references were made. [*Attorney-General v. Shore*] - 460
29. Testator gave annuities to his widow and son and directed the surplus of his personal estate and the rents of his real estate to be invested in stock, and the dividends to be accumulated, and to be and remain assets for improvement, in the hands of his executors, until the time and times should arrive when distribution should be made, as thereby directed: The testator then directed his real estates to be sold after the decease of the survivor of his wife and son and the proceeds to be invested in stock, and the dividends to be accumulated, to be and remain assets for improvement in the hands of his executors, for the benefit of his grandchildren and his nephew T. O. and to be distributed as they should become of the age of 25 years. The testator had two grandchildren born in his lifetime, both of whom died infants, one in his lifetime and the other after his death. Another grandchild was born after the testator's death who was an infant when the bill was filed. T. O. survived the testator and attained 25. Held that the bequest was void for remoteness. [*Porter v. Fox*] - 485
30. Testator bequeathed the whole of his property to his wife, for her life, and directed that upon her death, one-third should devolve on his

daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that, should she not marry again and have other children, her affection for their daughter would induce her to make the daughter her principal heir. The widow died unmarried. Held that she took an absolute interest in the two-thirds, under the will. [*Hoy v. Master*] 618

See ADEPTION, 2.—ALIENATION.—BANKRUPT, 3.—DECREE, 2.—DEED, 5.—EXECUTOR.—HEIR.—HUSBAND AND WIFE.—MAINTENANCE.—MARRIAGE ARTICLES.—REMOTE-NESS.—RESIDUARY BEQUEST.—SETTLEMENT.

CONSTRUCTION OF ACTS OF PARLIAMENT.

1. Where the court, in any proceeding in a cause, declares a party to be a trustee within the meaning of 11 G. 4, & 1 W. 4, c. 60, it may, by the same order, direct a conveyance to be made. [*Walton v. Merry*] - - - - - 328
2. The 14 days mentioned in 11 G. 4, & 1 W. 4, c. 36, s. 11, are exclusive of the first and inclusive of the last day. [*Ansdell v. Whitfield*] - 356
3. By 53 G. 3, c. 159, the responsibility of shipowners for damage done by their ships to other vessels, is limited to the value of the ship doing the damage. Held that such value must be ascertained as at the time of the accident. [*Dobree v. Schroder*] 291
4. The devise of a mortgage is not a trustee for the executors of the testator, within 11 G. 4, & 1 W. 4, c. 60. [*Ex parte Payne*] - - - - - 645

CONTEMPT.

An attachment had issued against a defendant for want of answer. The answer was afterwards filed, and the defendant took an office copy of it, the costs of the contempt remaining unpaid. Held, that the plaintiff had waived his right to enforce payment of the costs by process of contempt. [*Landars v. Allen*] 619

See CONSTRUCTION OF ACTS OF PARLIAMENT. DEFENDANT, 8.—PRACTICE, 8, 12, 16.

CONVERSION.

By a marriage settlement, the husband covenanted to pay, to the trustees, 1,200*l.* in trust, with the consent of the husband and wife and not without, to lay it out in the purchase of lands in fee, or for long terms of years, or of copyhold or customary tenure, and to settle the same on the husband for life, without impeachment of waste: remainder to the wife, for life, in bar of dower, remainder to the use of the children of the marriage as the husband and wife or the survivor of them should appoint, and, in default of appointment, to the use of all the children of the marriage in tail. The 1,200*l.* was invested in the funds, and so remained, with the acquiescence of the husband and wife. There was one child of the marriage. The wife survived her husband and afterwards died. Held that the fund ought to be considered as personal estate. [*Davies v. Good-hew*] - - - - - 585

COPYRIGHT.

A. made a copy of a print invented by

B., in colours and of larger dimensions, and exhibited it as a diorama. The Court refused to restrain the exhibition until the right had been established at law. [*Martin v. Wright*] - - - - - 297

See PUBLIC POLICY.

COSTS.

1. The costs of a suit for specific performance, against the infant heir of the vendor, ordered to be paid out of the purchase-money. [*Prytharch v. Havard*] - - - - - 9
2. Trustees who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of 6,600*l.* for the estate, but they afterwards sold it for 3,600*l.* The Court charged them with the loss, but gave them their costs as their conduct had not been wilful or perverse. [*Taylor v. Tabrum*] - - - - - 281
3. Personal service of an order for payment of costs, by a plaintiff to a person not a party to the suit, will be dispensed with, where the plaintiff cannot be found. [*Hunter v. —*] - - - - - 429
4. In a foreclosure suit, against an insolvent mortgagor and the provisional assignee of the Insolvent Court, who claims no interest, the plaintiff must pay the costs of the assignee and add them to his debt. [*Weaving v. Count*] - - - 439
5. By the decree on further directions in a creditor's suit, the costs of all parties were directed to be taxed as between solicitor and client and paid out of a fund in Court. The fund proving insufficient to pay the

costs, the defendants, the heir and administrator of the debtor petitioned to be paid their costs in the first instance. But the Court directed the fund to be divided amongst all the parties in proportion to their costs. [*Swale v. Milner*] - - - - - 572

See NEW ORDERS, 7.—SOLICITOR AND CLIENT.

COVENANT.

- A vicar, whilst the 13 Elizabeth, s. 20, against charging benefices, was repealed, charged his living with an annuity, and covenanted if he should exchange his living, to secure the annuity by charging and demising the new living, and that, in the meantime, it should be charged with the annuity. He afterwards exchanged his living, but did not execute any deed until after the revival of the 13 Elizabeth. Held that the covenant was a subsisting charge on the new living, and a receiver was appointed to provide for the annuity. [*Metcalf v. The Archbishop of York*] - - - 224
2. Where a testator has entered into a voluntary covenant to pay an annuity, the annuitant is a specialty creditor on his real estates notwithstanding the annuity did not become in arrear till after the testator's death. [*Jenkins v. Briant*]

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CREDITOR.

See COVENANT.—DEBTOR AND CREDITOR.

CREDITOR'S SUIT.

By the decree on further directions, in a creditor's suit, the costs of all
x x 3

parties were directed to be taxed as between solicitor and client, and paid out of a fund in Court. The fund proving insufficient to pay the costs, the defendants, the heir and administrator of the debtor, petitioned to be paid their costs, in the first instance. But the court directed the fund to be divided amongst all the parties, in proportion to their costs. [*Swale v. Milner*] - - - - - 572
See INFANT, 2. INTERROGATORIES.

CROSS BILL.

A. being in possession of an estate under a decree in 1783, B. filed a bill against him to recover the estate, and brought a writ of right for the same purpose; A. then filed a cross bill against B., seeking for a discovery of matters relating to B.'s pedigree, and praying that B. might elect whether he would proceed at law or in equity, and that, if he elected the latter, that he might be perpetually restrained from proceeding at law to recover the estate. B. demurred, because the bill sought a discovery of matters constituting his case at law, and because the order for putting him to his election ought to be obtained on motion, and not at the hearing. Demurrer over-ruled. [*Lowndes v. Davies*]

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See CAUSE AND CROSS CAUSE.

CROSS-REMAINDERS.

Testator devised an estate to A. for life, remainder to trustees to preserve, &c., remainder to all the children of A., as tenants in com-

mon, and not as joint tenants, and, for want of such issue, to B. for life, remainder to trustees to preserve, &c., remainder to all the children of B. as tenants in common, and not as joint tenants, and for want of such issue, to C. in fee. Held that the children of A. took estates for life, with cross-remainders between them, for life, with remainder to B. for life, with remainder to her children, as tenants in common, with cross-remainders between them for life, with remainder to C. in fee. [*Ashley v. Ashley*] - - - - - 358

CUMULATIVE LEGACIES.

Testator, by a will duly attested, gave legacies to various persons, charged upon his real and personal estates, and payable at the end of two years after his death, and he directed that, if his property should be more than sufficient to pay the legacies, they should be increased proportionably. By an unattested paper, purporting to be instructions for a will, but admitted to probate, the testator gave legacies to many of the legatees in the will, either individually or as members of a family; but the directions as to the time of payment and the increase of the legacies were omitted. Held that the legacies in the unattested paper were not substitutional for the legacies in the will, but cumulative. [*Strong v. Ingram*] - - - - - 197

See CONSTRUCTION, 23—25.

DEBTOR AND CREDITOR.

1. C. brought an action against F. in

the Lord Mayor's Court, for the recovery of a debt and issued an attachment against B., who had in his hands funds belonging to F. W. filed a bill against C. B. and F., claiming a lien on the funds, and obtained an injunction *ex parte*, to restrain proceedings in the action. Whilst the injunction was in force, F. became bankrupt. Held that though C. might, but for the injunction, have sued out execution long before F. became bankrupt, yet that he was not entitled to be paid otherwise than rateably with the other creditors. [*Ullock v. Barber.*] 300

2. A debtor conveyed certain of his estates to trustees, in trust to raise a fund for payment of his creditors named in a schedule, and to raise an annual sum for his own benefit. Several of the creditors executed the conveyance; but the trustees did not sell the estates, the creditors having received sums in or towards satisfaction of their debts, out of other estates conveyed by the debtor upon the same trusts. A judgment creditor, whose name was not mentioned in the schedule, filed his bill against the trustees of the first-mentioned estates and the debtor, stating as above, and that the trustees had entered into the receipt of the rents of those estates, the value of which greatly exceeded the scheduled debts, and praying that his debt might be raised and paid out of such parts of those estates as should not be sold for payment of the scheduled debts, and that an account might be taken of the receipts and payments of the trustees,

and for a receiver, and an injunction to restrain the trustees from paying any part of the rents or produce of the estates to the debtor. The trustees demurred, because the scheduled creditors who had executed the conveyance, were not parties to the bill. Demurrer allowed. [*Cocker v. Lord Egmont*] 311

3. Injunction granted to restrain the goods of a partnership from being taken in execution for a debt due from one of the partners, who died before the writ was delivered to the sheriff. [*Newell v. Townsend*] 419

4. A. made a voluntary assignment of a sum of money, being, at the time, indebted to B. on balance of a running account. A. afterwards made payments to B., exceeding in amount the balance due at the date of the assignment; but the balance continually increased. The assignment was set aside at the suit of B. [*Whittington v. Jennings*] - - 493

See CREDITOR'S SUIT.—DEED 3.

ESCROW.—INFANT, 2.

DEBTS.

See WILL, 13.

DEBTS AND LEGACIES.

See PURCHASER, 2, 3.

DECREE.

A testator devised his real estates to trustees, in trust to dispose of the rents for the benefit of the poor of the city of R. and the limits and precincts thereof. The trustees having applied the rents for the benefit of the poor of one only of the parishes in the city, an information

was filed, on behalf of two other parishes, claiming to participate in the charity, and a decree was made, in 1680, directing that the rents should, for ever thereafter, be divided amongst the three parishes in certain proportions. In 1808, an information was filed, on behalf of a fourth parish, for a similar purpose; and that parish was decreed to be entitled to a share of the rents, in proportion of its extent and population to the extent and population of the three other parishes; but the proportions, as between those parishes, were not to be altered. An information was afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents, on account of its population having increased more than the population of the other parishes. But the information was dismissed, the decree of 1680 being final. [*Attorney General v. The Mayor of Rochester*] - - - - - 273

2. In a suit by a husband against his wife and children (whom he had deserted) respecting the wife's share in an intestate's estate, the decree referred it to the Master to approve of a proper settlement on the wife, with liberty to all parties to lay proposals before the Master. Before the report was made the wife died. Held that the children were entitled to the benefit of the decree. [*Groves v. Perkins*] - - - - - 584

See DEMURRER OF PAROL.—PLEA AND PLEADING, 5.—PRACTICE, 10, 18.

DEED.

1. A. having received monies belonging to B. privately, and without any

communication with B., prepared and executed a mortgage to him for the amount. A. retained the deed in his custody for 12 years, and then died insolvent. After his death, the deed was discovered in a chest containing his title-deeds. Held that the deed was not an escrow, there being no evidence to show that it was executed conditionally, but that it took effect from its execution, and was good against A.'s creditors. [*Ertes v. Scott*] - - - - - 31

2. By a marriage settlement estates were limited to the wife and the husband, for their lives, with remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and, if more children than one equally to be divided among them as tenants in common; and, for default of such issue, to the wife and her heirs. Held that the husband did not take an estate in tail special, but for life only, and that the children took, by purchase as tenants in common in fee in remainder. - [*North v. Martin*] 286

3. A. assigned 800*l.* to trustees in trust during the life of B. or such part thereof as they should think proper, or at such other times and in such portions as they should judge expedient, to pay the interest to him, or, if they should think fit, to lay it out in procuring for him diet and other necessities, but so that he should not have any right to the interest other than the trustees, in their uncontrolled discretion, should think proper, and so as no creditor of his should have any claim thereon,

nor should the same be subject to his debts, disposition or engagements: and it was declared that, after his death, the 800*l.*, and all savings and accumulations of interest, if any, should be in trust for his children, and, if he should have no child, then in trust for C. B. became bankrupt. The trustees had paid him the interest down to his bankruptcy. Held that his life interest passed to his assignees. [*Snowdon v. Dales*] - - - - - 524

4. A wife, who had been deserted by her husband, became entitled to a share of an intestate's property, amounting to 3,609*l.* The husband, whilst he was ignorant of the amount of the share, assigned it in trust for his wife and children, subject to the payment of 10*s.* a week, to himself for life. Although the deed recited that the intestate's estate was very considerable, yet, as the administrators, who were the wife's brothers and parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside. [*Groves v. Perkins*] 576

5. A. being tenant in tail in remainder expectant on the death of B., entered into articles on his marriage, by which, after reciting that it had been agreed that the estate should, subject to B.'s life interest therein and to the raising, by mortgage or otherwise, of any sum or sums not exceeding 15,000*l.* for A.'s use, be settled to the uses thereafter expressed, covenanted that he would, subject to the raising, by any ways or means and at any time or times, should think proper, of the sum

or sums before mentioned, by mortgage, annuity, or otherwise for his own benefit, and to any deed or deeds he might make for securing the repayment thereof and interest do all necessary acts for settling the estates; subject to B.'s life interest, in the manner agreed upon. Held that A. was authorized to raise the 15,000*l.* by sale, and that he was justified in selling his interest in remainder in the whole of the estate, as the 15,000*l.* was nearly the full value of such interest. [*Tascher v. Small*] - - - - - 625

See PRODUCTION OF DOCUMENTS, 1, 2

DEFENDANT.

1. An attachment issued against a defendant before the making of a motion by him, but after service of the notice of motion, will not prevent the motion being made. [*Jeyes v. Foreman*] - - - - - 384
2. The Master being about to report the defendant's third answer insufficient, he put in a fourth answer, and then moved to stay the report. Motion refused, the court having no right to deprive the plaintiff of the benefit of the tenth order. [*Russell v. Dight*] - - - - - 430
3. If a defendant makes statements in his answer sufficient to show that he has incurred penalties, he cannot refuse to produce documents referred to in it on the ground that they afford evidence of his being subject to the penalties. [*Ewing v. Osbaldiston*] - - - - - 608

See ATTACHMENT. — CROSS-BILL. — DEMURRER OF PAROL.—PRACTICE, 18, 19.—PROCESS.

DEMURRER.

1. A bill praying discovery, and concluding with the prayer for general relief, is a bill for relief. [*Angell v. Westcombe*] - - - - - 30
 2. Where it appears on the face of the bill, that the cause of suit accrued more than six years before the filing of the bill, a defendant need not plead the statute of limitations, but may demur. [*Hoare v. Peck*] 51
 3. A bill of interpleader is not demurrable because it does not offer to bring the money claimed into court. But the plaintiff must bring it in, before he takes any step in the cause. [*Meux v. Bell*] - - 175
 4. A bill of discovery is demurrable, if the words, "stand to and abide such order and decree thereon" are inserted in the prayer of process. [*James v. Herriott*] - - - - 428
- See CROSS-BILL. — INSOLVENT DEBTOR. — MULTIFARIOUSNESS. — OUTSTANDING TERMS. — PARTIES. — PRACTICE, 18, 19.

DEMURRER OF PAROL.

As the demurrer of the parol has been abolished by 11 Geo. 4, & 1 Will. 4, c. 47, an infant defendant is not entitled to have six months given to him after attaining 21, to show cause against a decree. [*Powys v. Mansfield*] - - - - - 637

DESCENDANTS.

See REPRESENTATIVES.

DESCENT.

Testator devised his real estates to trustees in trust to pay an annuity, and, out of the residue of the rents,

to maintain S. W. (who was his heir) until he attained 21, and, on his attaining 21, to convey the estates to him in fee; but, if he died under 21, then to J. S. in fee. S. W. attained 21. Held that he took the estates by descent. [*Wood v. Shelton*] - - - - - 176

DEVASTAVIT.

See EXECUTOR, 2—4.

DISCOVERY.

See BILL OF DISCOVERY. — CROSS-BILL. — PRODUCTION OF DOCUMENTS.

DISMISSAL OF BILL.

See PRACTICE, 2.

DISTRIBUTIVE SHARE.

See WIDOW.

DOUBLE PORTIONS.

See PORTIONS.

DOWER.

See WIDOW.

ECCLESIASTICAL COURT.

This court is not bound by the decision of the Ecclesiastical Court as to the effect of a bequest. [*Hastings v. Hane*] - - - - - 67

ECCLESIASTICAL BENEFICE.

See COVENANT.

ELECTION.

See CROSS-BILL.

EQUITABLE WASTE.

See WASTE.

ESCROW.

- A. having received monies belonging to B., privately and without any communication with B., prepared and executed a mortgage to him for the amount. A. retained the deed in his custody for 12 years, and then died insolvent. After his death, the deed was discovered in a chest containing his title deeds. Held that the deed was not an escrow, there being no evidence to show that it was executed conditionally, but that it took effect from its execution, and was good against A.'s creditors. [*Exton v. Scott*] - - - - 81

ESTATE TAIL.

See TENANT IN TAIL.

EVIDENCE.

1. An uncle made a provision by his will, for his niece, and, afterwards by a settlement on her marriage. The question being whether the latter was intended to be a satisfaction of the former, extrinsic evidence was admitted to show that the uncle stood in *loco parentis* to his niece. [*Powys v. Mansfield*] - - - 528
2. Evidence cannot be read, even on behalf of an infant, as to a fact not stated in the bill unless it is put in issue by his answer. [*Ibid.*] - 565

EXCEPTIONS.

1. On the hearing of exceptions to a Master's report, no parts of the answer can be read, except those which were read before the Master. [*Rands v. Pushman*] - - - - 46
2. If one general exception is taken to the Master's certificate, approving

of interrogatories under a decree, and the Court is of opinion that one only of the interrogatories ought not to have been approved of, the exception will be allowed. [*Moore v. Langford and Wife*] - - - 323

3. The Master being about to report the defendant's third answer insufficient, he put in a fourth answer, and then moved to stay the report. Motion refused, the Court having no right to deprive the plaintiff of the benefit of the tenth order. [*Russell v. Dight*] - - - - 430
4. Where a Master reports as to matter not referred to him, his report ought not be excepted to, but it ought to be referred back to him to be reviewed, and even if that is not done, the unwarranted finding will be disregarded. [*Jenkins v. Briant*] 603

EXCHANGE.

See POWER OF SALE AND EXCHANGE.

EXECUTION.

See DEBTOR AND CREDITOR, 3.

EXECUTOR.

1. A testatrix gave legacies of 100*l.* each, to A., B. and C.; and, in a subsequent part of her will, she appointed them her executors. In the preceding clauses, she made devises and bequests "to her executors thereafter named," and "to her executors and trustees." A. neither proved nor acted. Held that he was not entitled to the legacy. [*Piggott v. Green*] - - - - 72
2. Executors who were directed by the will to call in the testator's per-

sonal estate, with all convenient speed, continued his trade for some years after his death, and ultimately a considerable loss was sustained. But the Court refused to charge them with the loss, as they had acted *bonâ fide*, and according to the best of their judgment. [*Garrett v. Noble*] - - - - - 504

3. If a person interested under a will, files a bill for an account, against the executors, not seeking to charge them for wilful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of were known to the deceased plaintiff. [*Ibid.*]

4. An executor will be allowed payments made by him to simple contract creditors of his testator, a bond being in existence but not payable, but he will not be allowed payments to legatees, notwithstanding he had no notice of the bond. [*Norman v. Baldry*] - - - - - 621

See CREDITOR'S SUIT.—PRACTICE, 21.—VENDOR AND PURCHASER, 3.

EXONERATION.

A father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose and covenanted to pay the money. By his will he directed his debts to be paid, first, out of the residue of his personal estate, then, out of his money in the funds, and, lastly, out of his residuary real estates. Held that the mortgaged estate was not to be exonerated from the portion out of the personal estate. [*Graves v. Hicks*] - 398

EXTRINSIC EVIDENCE.

See EVIDENCE.

FEME COVERT.

1. An order for payment to the husband, of money to which his wife is entitled, cannot be inserted in the order on further directions, but must be obtained by petition, although the wife consents. [*Campbell v. Harding*] - - - - - 283

2. A trust for the separate use of a woman, whether single or married, is valid. [*Davis v. Thornycroft*] 420

See SEPARATE USE.

FORECLOSURE.

See COSTS, 4.

FORFEITURE.

See ALIENATION.

FRAUD.

1. A deed in the custody of a purchaser for valuable consideration, which the bill impeached for fraud, ordered, under special circumstances, to be produced. [*Kennedy v. Green*] 6

2. A wife who had been deserted by her husband, became entitled to a share of an intestate's property, amounting to 3,609*l.* The husband, whilst he was ignorant of the amount of the share, assigned it in trust for his wife and children, subject to the payment of 10*s.* a week to himself for his life. Although the deed recited that the intestate's estate was very considerable, yet as the administrators, who were the wife's brothers and parties to the transaction,

did not disclose to the husband the amount of the share, the deed was set aside. [*Groves v. Perkins*] 576
See ACCOUNT, 1.—PUBLIC POLICY.

GUARDIAN.

Guardian appointed to an infant entitled to freehold property worth 80*l.* a year, without a reference. [*Ex parte Jackson*] - - - - 212

HARD BARGAIN.

See AGREEMENT, 2.

HEIR.

Testator devised his real estates to trustees in trust to pay an annuity, and, out of the residue of the rents, to maintain S. W. (who was his heir) until he attained 21, and, on his attaining 21, to convey the estates to him in fee; but, if he died under 21, then to J. S. in fee. S. W. attained 21. Held that he took the estates by descent. [*Wood v. Shelton*] - - - - - 176

See CREDITOR'S SUIT.

HUSBAND AND WIFE.

Testator bequeathed 700*l.* to his daughter's husband, his executors, &c. in trust to pay the interest to his daughter, for her separate use for life, and, after her death, to such persons as she should appoint by will, and, in default of appointment, to her personal representatives. The daughter died without having made any appointment. Held that her next of kin, to the exclusion of her husband, were entitled to the 700*l.* [*Robinson v. Smith*] - - 47
See CONSTRUCTION, 7, 20.—DECREE, 2.—DEED, 4.—FEME COVERT.—WIDOW.

IMPEACHMENT OF DECREE.

See PLEA AND PLEADING, 5.

IMPERTINENCE.

See NEW ORDERS, 7.

IMPLIED GIFT.

See CONSTRUCTION, 18.—CROSS REMAINDERS.

INADEQUACY OF CONSIDERATION.

See FRAUD, 2.

INFANT.

1. Guardian appointed to an infant entitled to freehold property worth 80*l.* a year, without a reference. [*Ex parte Jackson*] - - - - 212
2. Where an infant has an allowance made to him, by his guardians, for his support, a tradesman is not entitled to be paid for articles supplied to the infant, on credit, unless he can make out that, having regard to the infant's circumstances and station (which he is bound to inquire into), the articles were necessities. [*Mortara v. Hall*] - - - - 465
3. Evidence cannot be read, even on behalf of an infant, as to a fact not stated in the bill unless it is put in issue by his answer. [*Powys v. Mansfield*] - - - - - 565
See COSTS, 1.—DEMURRER OF PAROL.

INFANT TRUSTEE.

Where the Court, in any proceeding in a cause, declares a party to be a trustee within 11 Geo. 4 & 1 Will. 4, c. 60, it may, by the same order, direct a conveyance to be made. [*Walton v. Merry*] - - - - 328

INFORMATION.

See CHARITY.

INJUNCTION.

1. A receiver having been appointed, in a creditor's suit, of the office of master forester of a royal forest, an injunction was afterwards granted to restrain certain persons who owned lands in the forest, from sporting in it. [*Blanchard v. Cawthorne*] - - - - - 155
 2. Injunction granted to restrain the Lords of the Treasury from paying the compensation awarded under 11 G. 4 & 1 W. 4, c. 58, for the office of side clerk in the Exchequer, which had been abolished. [*Ellis v. Earl Grey*] - - - - - 214
 3. Where a party agrees not to do a particular act, and there are other terms in the agreement which are so vague that the Court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. The Court will not give any assistance to a party seeking to enforce a hard bargain. [*Kimberley v. Jennings*] - - 340
 4. Under the 10th order of 1833, the common injunction cannot be obtained on an amended bill until five weeks after appearance, and, if the defendant is then in default, the application must be made according to the old practice. [*Lee v. Ravenscroft*] - - - - - 474
- See* AGREEMENT.—BANKRUPT.—COPYRIGHT.—DEBTOR AND CREDITOR, 1—3.—MULTIFARIOUSNESS.—PLEA AND PLEADING, 6.—WASTE

INSOLVENT DEBTOR.

To a bill filed by the assignee of an insolvent debtor, the defendant pleaded that the consent of the creditors and of the Insolvent Debtors' Court, to the institution of the suit, had not been obtained. Plea overruled. [*Casborne v. Barsham*]

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In a foreclosure suit against an insolvent mortgagor and the provisional assignee of the Insolvent Court who claims no interest, the plaintiff must pay the costs of the assignee and add them to his debt. [*Weaving v. Count*] - - - 439

INSUFFICIENCY.

See EXCEPTIONS, 3.

INTEREST.

Testator gave a legacy to his daughter, and all his real and personal estate to his wife, and, after her death, he gave his real estate, subject to the legacy, to his son in fee. The wife survived the testator, and afterwards died. Held that the legacy, with interest from the end of a year after the testator's death, was raiseable out of the real estate, in case the personal estate was deficient. [*Freeman v. Simpson*] 75

See ACCOUNTS.—DRED, 3.

INTERPLEADER.

1. Where a principal has created a lien in favour of another person, on funds in the hands of his agent, the agent may file a bill of interpleader against his principal and the other claimant. [*Smith v. Hammond*] 10
2. A bill of interpleader is not de-

murtable, because it does not offer to bring the money claimed into court. But the plaintiff must bring it in, before he takes any step in the cause. [*Meux v. Bell*] - - 176

INTERROGATORIES.

If, in a creditor's suit, a decree is made in the usual form, no special interrogatory for the examination of the defendants, ought to be allowed, although a case for directing special inquiries, is made on the record. [*Moore v. Langford and Wife*] - - - - - 323

See EXCEPTIONS, 2.—RE-EXAMINATION.

JOINTURE.

See CONSTRUCTION, 2.

JUDGMENTS.

Notice to a purchaser, of judgments against the vendor, whose estate is limited to uses to bar dower, does not prevent the purchaser from taking the estate free from the judgments, under an exercise of the power reserved to the vendor. [*Eaton v. Sanxter*] - - - - - 517

See DEBTOR AND CREDITOR, 3.

JUDGMENT CREDITOR.

See DEBTOR AND CREDITOR, 2.

JURISDICTION.

1. Injunction granted to restrain the Lords of the Treasury from paying the compensation awarded under 11 Geo. 4 and 1 Will. 4, c. 58, for the office of side clerk in the Exchequer, which had been abolished. [*Ellis v. Earl Grey*] - - - 214
2. The proprietors of Covent-garden

Theatre agreed with an actor, that he should act for 24 nights, during a certain period of time, at their theatre, and that, in the meantime, he should not act at any other place in London. Held that the Court cannot enforce the positive part of the contract, and therefore, it will not restrain, by injunction, a breach of the negative part. [*Kemble v. Kean*] - - - - - 333

See AGREEMENT, 2.

LEASEHOLDS FOR LIVES.

See CONSTRUCTION, 8.

LEGACY.

1. A testator domiciled in Jamaica, became, during a temporary residence at Frankfort, engaged and betrothed to a lady; and by a codicil to his will, after mentioning her by name, and alluding to his intended marriage with her, gave 3,000*l.* to his wife. During the engagement, but before the marriage, the testator died. Held that the lady was entitled to the legacy. [*Schloss v. Stiebel*] - - - - - 1
2. Testator gave, to his wife, his house in B. and the furniture in the said house. The lease of the house expired in the testator's lifetime, and he took another house, and removed his furniture to it. Held that the legacy was adeemed. [*Colleton v. Garth*] - - - - - 19
3. A testatrix gave legacies of 100*l.* each to A. B. and C.; and, in a subsequent part of her will, she appointed them her executors. In the preceding clauses she made devises and bequests "to her executors thereafter named," and "to her

executors and trustees." A. neither proved nor acted. Held that he was not entitled to the legacy.

[*Piggott v. Green*] - - - - 72

4. Testator gave a legacy to his daughter, and all his real and personal estate, to his wife, and, after her death, he gave his real estate, subject to the legacy, to his son in fee. The wife survived the testator, and afterwards died. Held that the legacy with interest from a year after the testator's death, was raiseable out of the real estate in case the personal estate was deficient. [*Freeman v. Simpson*] - - - - 75

5. Testator devised his estates, charged with debts and legacies. The devisee mortgaged the estate to A. subject, expressly, to the legacies, A. having called in his money, and the devisee requiring a further advance, they join in mortgaging the estate to B. but not, expressly, subject to the legacies, and B. is informed, falsely, by the devisee that all the legacies had been paid. Held that B. took the estate subject to the legacies. [*Rogers v. Rogers*]

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6. Testator directed his trustees to pay, to his daughters their portions on their marrying with the consent, in writing, of his trustees first had and obtained; and, on their marrying without such consent, that the trustees should stand possessed of their fortunes, in trust for their separate use, for life, with remainder to their children. A. proposed to the trustees to marry one of the daughters, who was an infant. The terms, as communicated to her by one of the trustees, were, that 500 l.

should be paid to A., on his marriage, out of her portion, and that the remainder should be invested, in the names of trustees, for her sole use and benefit, the interest to be paid to her only. The daughter accepted the proposals, and asked the consent of the trustees. The same trustee then wrote a letter, to the daughter, saying that he and his co-trustee had not then signed the consent, but were ready to do so as soon as requisite; and a draft was prepared by which (subject to the payment of the 500 l. to the husband) the portion was settled on the intended husband during his solvency, then on the intended wife, for her separate use, for life, with remainder to the children, with remainder to the survivor of the intended husband and wife. A. having made certain arrangements for the disposal of the 500 l., which the trustees disapproved of, the trustee who had written the letter refused to look at the draft of the settlement, saying he should expect A. to make some other proposals respecting the disposal of the 500 l. Another arrangement was accordingly made and communicated to the trustee, but he took no notice of it, and his name was struck out of the settlement; and the marriage (to which his co-trustee had duly consented) was had, without further communication with him. Held that the letter was a sufficient consent on his part to the marriage. [*Le Jeune v. Budd*] - - - - 441

See CUMULATIVE LEGACIES. — PORTIONS, 1. — PURCHASER, 3. — SPECIFIC LEGACY. — WILL, 12, 23.

LEGAL REPRESENTATIVES.

Testator gave 450*l.* to trustees, their executors, &c. in trust for his son for life, and after his son's decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the legal representatives of his son. And he gave the residue of his personal estate to his son, his executors, &c. Held that the words 'legal representatives' meant next of kin. [*Walter v. Ma-kin*] - - - - - 148

LENGTH OF TIME.

See REDEMPTION.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIVING.

See CHARGE ON BENEFICE.

LOCUS PARENTIS.

See SATISFACTION, 2, 3, 4.

LORDS OF THE TREASURY.

See INJUNCTION, 2.

MAINTENANCE.

Testator gave his residuary estate to trustees, in trust for his sisters' younger children equally, and to vest in them at the usual periods, and he directed his trustees, during the minorities of the children, to pay the interest of their shares to his sisters, or to the guardians of the children, to be applied for their maintenance and education. Held that the sisters were entitled to receive the interest of their children's shares during the minorities of their children. [*Berkeley v. Swinburne*] - - - - - 613

MARRIAGE ARTICLES.

By marriage articles, it was agreed that estates should be settled in strict settlement, and that there should be contained, in the settlement, powers to the husband, to charge the estates, by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers, &c. usually inserted in settlements of the like nature, and which should be proper for effecting any of the purposes aforesaid. Held that a power of sale and exchange might be introduced into the settlement. [*Hill v. Hill*] - - - - - 136

See CONSENT TO MARRIAGE.—CONSTRUCTION, 13.—POWER OF SALE. SETTLEMENT.

MASTER IN ROTATION.

See CONSTRUCTION, 28.

MASTER'S CERTIFICATE.

See EXCEPTIONS, 2.

MASTER'S REPORT.

See REPORT.

MESSENGER.

See PRACTICE, 8.

MISJOINDER.

See PARTIES, 2.

MISTAKE.

In taking accounts directed by the decree, certain payments which had been made by A. and B. jointly, were represented and reported by the Master to have been made by B. separately. After the report had

been absolutely confirmed, and B. had become bankrupt, the Court, on the petition of A. discharged the order to confirm the report, and referred it back to the Master to review his report. [*Prentice v. Mensall*] - - - - - 271

MORTGAGE.

1. A. and B. being seised in fee, in right of their wives, of two undivided fourth parts of an estate, subject to a mortgage term, joined, in 1784, with the owner of the other moiety, in conveying the estate, by lease and release, but without a fine, to a purchaser in fee. The mortgage was paid off, and the term assigned to attend. The purchaser, and those claiming under him, had been in possession from the date of the conveyance. A.'s wife survived him, and died in 1825, leaving one of the plaintiffs her heir. B.'s wife died in 1818, leaving the other plaintiff her heir. B. died in 1826. In 1830 the plaintiffs brought an ejectment, but were nonsuited by the defendants setting up the term. In 1831 they filed a bill to redeem, which was dismissed, on account of the length of possession by the defendants, and those under whom they claimed. [*Ashton v. Milne*]

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2. A father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money. By his will, he directed his debts to be paid first out of the residue of his personal estate, then out of his money in

the funds, and, lastly, out of his residuary real estates. Held that the mortgaged estate was not to be exonerated, from the portion, out of the personal estate. [*Graves v. Hicks*] - - - - - 398

See CONSTRUCTION, 10.

MORTGAGOR AND MORTGAGEE.

- A. conveyed his estates to B., in trust to sell, and pay off a mortgage and other incumbrances on the estates, and to retain a debt due to B., and until the sale, to apply the rents in keeping down the interest on the charges, and to pay the surplus to A. B. took a transfer of the mortgage and entered into and remained in possession for 24 years, but did not sell the estates. For the first ten years the rents were less than the interest; but, afterwards, they exceeded it. A. filed a bill for an account of the rents received by B., with yearly rests, and for a re-conveyance of the estates. But the Court refused to direct the rests. [*Latter v. Dashwood*] - 462

See COSTS, 4.—MORTGAGE.

TRUSTEE.

MULTIFARIOUSNESS.

- A. died intestate, leaving a widow and infant children his next of kin. The widow, without taking out administration, possessed his assets and paid his debts, and died, having bequeathed her personal estate to the children, and appointed B. and C. her executors. D. then took out administration to the intestate and brought an action, as trustee for

the children, against B. and C. for monies alleged to be due from the testatrix to the intestate's estate. B. and C. together with the children, filed a bill against D. praying for all proper accounts of the assets of the intestate and testatrix, possessed by B. and C., and by D., and of what, if anything, was due from the testatrix's estate to the intestate's estate, and for an injunction to restrain the action. Held that the bill was not multifarious. [*Lewis v. Edmund*] - - - - - 251

NECESSARIES.

Where an infant has an allowance made to him, by his guardians, for his support, a tradesman is not entitled to be paid for articles supplied to the infant, on credit, unless he can make out that, having regard to the infant's circumstances and station (which he is bound to inquire into), the articles were necessities. [*Mortara v. Hall*] 465

NEXT OF KIN.

See HUSBAND AND WIFE.—LEGAL REPRESENTATIVES.

NEW ORDERS.

1. The respondents to a charity petition are parties to it, and therefore they are not within the 44th order. [*In re Willoughby's Charity*] - 18
2. The 17th order of 1831 does not apply, except in cases where the plaintiff requires a commission; in other cases the old practice remains unaltered. [*Williams v. Janaway*] 77

3. The orders of the Court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from. [*Burrell v. Nicholson*] - - - - - 212
4. The time allowed by the 12th order for procuring the report as to the insufficiency of an answer, extended; the drawing up of the order having been delayed by the offices being closed, and the plaintiff having, through inadvertence, omitted to obtain the Master's certificate that further time was necessary to enable him to make his report. [*Ibid.*] 212
5. Plaintiff obtained an order for a commission to examine witnesses, but did not take it out. Held that, under the 17th order of 1831, the defendant was entitled to take out a commission. [*Rattenbury v. Fenton*] - - - - - 363
6. Where a decree in a cause in which previous references have been made, directs a reference to the Master in rotation, the decree will be carried to the Master to whom the previous references were made. [*Attorney-general v. Shore*] - - - - - 460
7. Where a report of scandal or impertinence has been excepted to, the Master cannot tax the costs of the reference under the 22d order of 1833, without further order. [*Desanges v. Gregory*] - - - - - 473
8. Under the 10th order of 1833, the common injunction cannot be obtained on an amended bill, until five weeks after appearance, and, if the defendant is then in default, the application must be made according

to the old practice. [*Lee v. Ravenscroft*] - - - - - 474

NEWSPAPER.

See PUBLIC POLICY.

NOTICE.

See PLEA AND PLEADING, 3.—
ORDER AND DISPOSITION.—
VENDOR AND PURCHASER, 4.

OPENING BIDDINGS.

1. Biddings opened on an advance of 300 l. on 5,030 l. [*Lawrence v. Haliday*] - - - - - 296
2. A motion to open biddings for several lots purchased by different purchasers, on an advance of a certain sum for each lot, is irregular. [*Goodall v. Pickford*] - - - 379
3. An estate was put up to sale in four lots, and the timber on each lot was to be paid for by the purchaser, according to a valuation which had been made. A. purchased lot 1; the other lots were not sold. B. opened the biddings, and on the re-sale, purchased lots 1 and 2, for 2,140 l., and lot 3, at 380 l. The Court refused to open the biddings for lots 1 and 2, on the application of A., unless he would advance 10 per cent. on the price of the timber, as well as the land, and would take lot 3 (in case B. should retire from it) at the price it had been sold for, in case it should not fetch the same price at the re-sale. [*Bates v. Bonnor*] 380

ORDER.

By a mistake in the Registrar's office, an order, made on an undertaking

to speed, was erroneously drawn up. The order was discharged, with costs of the application to discharge it; it being the duty of the party who procures an order, to see that it is properly drawn up. [*Landars v. Allen*] - - - - - 620

ORDER AND DISPOSITION.

A. on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A. on behalf of the owner, a certain sum for the freight of the ship, by two instalments, one to be paid on the sailing of the ship, and the other, on the completion of the voyage. The owner being indebted to C., ordered, in writing, A. to pay to C. all monies he might receive under the charter-party; and, accordingly, A. paid over the first instalment to C. The owner then assigned, by deed, the remainder of the freight to C., who gave notice of the assignment to A., but not to B. The vessel completed her voyage, and, afterwards, the owner became bankrupt. Held that the remainder of the freight was not in his order and disposition at his bankruptcy. [*Gardner v. Lachlan*] - - - - - 407

ORDER FOR TIME.

See PRACTICE, 25.

ORDERS.

See NEW ORDERS.

ORIGINAL AND SUPPLEMENTAL BILL.

See PLEA AND PLEADING, 5.

ORNAMENTAL TIMBER.*See WASTE.***OUTSTANDING TERMS.**

Demurrer allowed to a bill to prevent the setting up of outstanding terms, as it alleged, merely, that the defendant threatened to set up some outstanding term. Such a bill ought to state that there are such terms and what is the nature of them. [*Stansbury v. Arkwright*] - - 481

OWELTY OF EXCHANGE.*See POWER OF SALE AND EXCHANGE.***PARENT AND CHILD.**

In a suit by a husband against his wife and children, (whom he had deserted), respecting the wife's share in an intestate's estate, the decree referred it to the Master to approve of a proper settlement on the wife, with liberty to all parties to lay proposals before the Master. Before the report was made, the wife died. Held that the children were entitled to the benefit of the decree. [*Groves v. Perkins*] - - - 584

PAROL.*See DEMURRER OF PAROL.***PARTIES.**

1. A debtor conveyed certain of his estates to trustees, in trust to raise a fund for payment of his creditors named in a schedule, and to raise an annual sum for his own benefit. Several of the creditors executed the

conveyance, but the trustees did not sell the estates, the creditors having received sums in or towards satisfaction of their debts, out, of other estates conveyed by the debtor upon the same trusts. A judgment creditor, whose name was not mentioned in the schedule, filed his bill against the trustees of the first mentioned estates and the debtor, stating as above, and that the trustees had entered into the receipt of the rents of those estates, the value of which greatly exceeded the scheduled debts, and praying that his debt might be raised and paid out of such parts of those estates as should not be sold for payment of the scheduled debts, and that an account might be taken of the receipts and payments of the trustees, and for a receiver, and an injunction to restrain the trustees from paying any part of the rents or produce of the estates, to the debtor. The trustees demurred, because the scheduled creditors who had executed the conveyance were not parties to the bill. Demurrer allowed. [*Cocker v. Lord Egmont*]

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2. A bill is not demurable because the legatees of a testator join with his executor in suing for a debt due to his estate. [*Rhodes v. Warburton*]

617

PARTITION.

A tenant for life of an undivided share of an estate, with remainders to his unborn sons in tail, may file a bill for a partition, and the decree will be binding on the sons when *in esse*. [*Gaskell v. Gaskell*] - - 643

PARTNERSHIP.

By articles of partnership it was agreed that just and true accounts should be made out, half yearly, and signed by the partners, and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners; and after the death of two of the other partners it was discovered that the accounts were fraudulent. Held that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. [*Oldaker v. Lavender*]

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See DEBTOR AND CREDITOR, 3.

PAYMENTS.

See DEBTOR AND CREDITOR, 4.

PERPETUATION OF TESTIMONY.

See PRACTICE, 20.

PERSONAL ESTATE.

See MORTGAGE, 2.

PERSONAL REPRESENTATIVES.

See HUSBAND AND WIFE.—REPRESENTATIVES.

PETITION.

See SERVICE.

PLAINTIFF.

A bill was filed against two trustees, alleging that one of them only had acted in the trusts, and seeking to charge that trustee only with a breach of trust. The trustees, in

their answer, admitted that they had both acted in the trusts. The plaintiffs, however, did not amend their bill. Held that they were nevertheless entitled to charge both the trustees with the loss occasioned by the breach of trust. [*Taylor v. Tabrum*] - - - - - 281

See CONTEMPT.—CROSS-BILL.—EXCEPTIONS, 3.

PLEA AND PLEADING.

1. Where it appears, on the face of the bill, that the cause of suit accrued more than six years before the filing of the bill, a defendant need not plead the Statute of Limitations, but may demur. [*Hoare v. Peck*] - - - - - 51
2. To a bill filed by the assignee of an insolvent debtor, the defendant pleaded that the consent of the creditors and of the Insolvent Debtors' Court to the institution of the suit, had not been obtained. Plea overruled. [*Casborne v. Barsham*] 317
3. Defendant pleaded, to the whole bill, that he was a purchaser for valuable consideration, without notice, and, by answer in support of the plea, denied the charges of notice. Held that the answer overruled the plea. [*Lord Portarlington v. Soulby*] - - - - - 356
4. A bill was filed against A. and others, but, before he was served with a subpoena, he went abroad. The bill was then amended by stating that A. was out of the jurisdiction, and a decree was made. A. then filed an original bill to impeach the decree, on the ground that he was in England when the former bill was filed, but was not served

- with process. The defendants demurred on the ground that the decree could not be impeached except by a supplemental bill in the first suit. Demurrer over-ruled. [*Warterton v. Croft*] - - - - 431
5. A. being in possession of an estate under a decree in 1783, B. filed a bill against him to recover the estate, and brought a writ of right for the same purpose; A. then filed a cross bill against B., seeking for a discovery of matters relating to B.'s pedigree, and praying that B. might elect whether he would proceed at law or in equity, and if he elected the latter, that he might be perpetually restrained from proceeding at law to recover the estate. B. demurred, because the bill sought a discovery of matters constituting his case at law, and because the order for putting him to his election ought to be obtained on motion, and not at the hearing. Demurrer over-ruled. [*Lowndes v. Davies*] - 468
6. Demurrer allowed to a bill to prevent the setting up of outstanding terms, as it alleged, merely, that the defendant threatened to set up some outstanding term. Such a bill ought to state that there are such terms and what is the nature of them. [*Stansbury v. Arkwright*] 481
7. A bill is not demurrable because the legatees of a testator join with his executor in suing for a debt due to his estate. [*Rhodes v. Warburton*] 617
8. A. died indebted to B. C. took out administration to A., got in his estate, and afterwards died. D. took out administration to A. B. filed a bill against D. and C.'s executor, for an account of A.'s estate possessed by D. and by C. The executor

pleaded an account stated by him to D. after the filing of the bill and a release executed to him by D. on payment of the balance, but did not annex the account to his plea. Held that the plea was not double, and that it was not necessary to annex the account. [*Holland v. Sproule*] 623

See DEMURRER.—MULTIFARIOUSNESS.—PARTIES.

PORCTIONS.

1. On a marriage, the father and husband of the lady gave bonds for 3,000*l.* each, to be paid to the trustees upon the trusts of the settlement. The father died, leaving the whole of the principal, and some of the interest due on his bond, and having bequeathed 3,000*l.* to his executors, upon the same trusts for the benefit of his daughter, and her husband and their issue, as were declared, by the settlement, of the trust-moneys therein comprised. Held that the legacy was not a satisfaction of the father's bond. [*Foster v. Evans*] - - - - - 15
2. Testator being seised of a reversion in fee expectant on the death and failure of issue male of himself and his brother, and being possessed of a leasehold estate, and of stock in the funds, devised the reversion to the trustees for the term of 1,000 years and gave to them the leasehold estate and stock, in trust to raise 10,000*l.*, which he directed to be held in trust for his niece Julia, the daughter of his brother, for life, and, after her decease, in trust for any husband who might survive her, and, after the decease of the survivor of them, in trust for all the children of his niece who should be then

- living. The niece married about three months after the date of the will: and, by a settlement made in contemplation of the marriage, the testator, in consideration of natural love, &c. for his niece Julia, the daughter of his brother, and for her advancement in life and to provide a maintenance for her, charged the reversion with the payment (after the death of the survivor of himself and his brother without leaving issue male who should attain 21) of the interest of 10,000*l.* to his niece's husband for life, and after his decease, to his niece for life, and, after the decease of the survivor, with the payment of 10,000*l.* to trustees in trust for the younger children of the marriage. About a year afterwards the testator by a codicil, disposed of a certain portion of his property, not before mentioned, and, in all other respects, confirmed his will. The testator died a bachelor. His brother afterwards died leaving issue Julia and five other daughters. Held that the provision made by the settlement was not a satisfaction of the provision made by the will. [*Powys v. Mansfield*] - - - 528
3. An uncle made a provision by his will for his niece, and afterwards by a settlement on her marriage. The question being whether the latter was intended to be a satisfaction of the former, extrinsic evidence was admitted to show that the uncle stood in *loco parentis* to his niece. [*Ibid.*]
4. No person can be held to stand in *loco parentis* to a child whose father is living, and who resides with and is maintained by the father according to his means. [*Ibid.*]
5. By a marriage settlement, a term of years was created for raising portions for younger children, which were to vest at the usual periods, but were not to be paid till after the father's death. And there were the usual clauses for survivorship and maintenance, and also a proviso that any advance of money, made by the father in his lifetime, to the children, should be a satisfaction *pro tanto* of their portions, unless the father should, in writing, direct the contrary. The father devised all his real estates not in settlement, to trustees in trust to sell and pay his debts &c., and to pay the surplus equally amongst all his children (except his eldest son) at the usual times; and, if any of them died under 21 leaving issue, their shares were to go to their issue, but if they left no issue, then to the survivors; and the will contained a clause for the advancement of the children, but was silent with respect to the provision being a satisfaction of the portions. The eldest son filed a bill insisting that the provision by the will, was intended to be a satisfaction of the portions. Some of the younger children demurred. The Court was of opinion that the provision by the will, although it was to arise from the sale of lands, and although the will contained no declaration on the subject, might be a satisfaction of the portions. But the demurrer was overruled, as it could not appear, until the hearing, whether there would be any fund that might be a satisfaction. [*Fazakerley v. Gillibrand*] - - - 591

See CONSTRUCTION, 10.—LEGACY, 6.

POWER.

See CONSTRUCTION, 4, 13, 18.—PROBATE DUTY.—SCOTCH SETTLEMENT.—VENDOR AND PURCHASER, 4.—WILL, 23.

POWER OF SALE.

A. being tenant in tail in remainder expectant on the death of B., entered into articles on his marriage, by which, after reciting that it had been agreed that the estate should, subject to the life interest therein, and to the raising, by mortgage, or otherwise, of any sum or sums not exceeding 15,000 £ for his use, be settled to the uses thereafter expressed, covenanted that he would, subject to the raising by any ways or means and at any time or times he should think proper, of the sum or sums before-mentioned by mortgage, annuity or otherwise for his own benefit, and to any deed or deeds he might make for securing the repayment thereof and interest, do all necessary acts for settling the estate, subject to the life interest in the manner agreed upon. Held that A. was authorized to raise the 15,000 £. by sale; and that he was justified, in selling his interest in the whole of the estate, as the 15,000 £. was nearly the full value of such interest. [*Tascher v. Small*] 625

POWER OF SALE AND EXCHANGE.

1. The donees of a power of sale and exchange, may pay money for owelty of exchange although they are not expressly authorized so to do. [*Bartram v. Whichcote*] - 80

2. By marriage articles, it was agreed that the estates should be settled in strict settlement, and that there should be contained in the settlement powers to the husband, to charge the estates by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers, &c. usually inserted in settlements of the like nature, and which should be proper for effecting any of the purposes aforesaid. Held that a power of sale and exchange might be introduced into the settlement. [*Hill v. Hill*] - - - - - 136

POWER TO APPOINT NEW TRUSTEES.

See CONSTRUCTION, 13.

PRACTICE.

1. On the hearing of exceptions to a Master's report, no parts of the answer can be read, except those which were read before the Master. [*Rands v. Pushman*] - - - - 46
2. The 17th order of 1831, does not apply except in cases where the plaintiff requires a commission: in other cases the old practice remains unaltered. [*Williams v. Janaway*] 77
3. The order for confirming absolutely a Master's report as to a purchase, when served, operates from the day on which it was pronounced. [*Aberdeen v. Watkin*] 146
4. Motion by a defendant for the production of a document admitted by the plaintiff to be in his custody, refused. [*Milligan v. Mitchell*] 186

5. The orders of the Court are to be considered as laying down general rules, but not as being so imperative as that they can, under no circumstances, be departed from. [*Burrell v. Nicholson*] - - - - 212
6. The time allowed by the 12th order for procuring the report as to the insufficiency of an answer was extended, the drawing up of the order having been delayed by the offices being closed, and the plaintiff having, through inadvertence, omitted to obtain the Master's certificate that further time was necessary to enable him to make his report. [*Ibid.*] - - - - 212
7. An order for payment, to the husband, of money to which his wife is entitled, cannot be inserted in the order on further directions, but must be obtained by petition, although the wife consents. [*Campbell v. Harding*] - - - - 288
8. The defendant had been taken under an attachment for want of answer, but, on his paying the sheriff 40*l.* to be repaid on putting in his answer, the sheriff, at the request of the plaintiff's agent, discharged him. Motion for a messenger to take the defendant, who had not put in his answer, refused. [*Swindell v. Swindell*] - - - 295
9. A defendant who had been taken on an attachment for want of appearance, was discharged under 11 Geo. 4, & 1 Will. 4, c. 36, before plaintiff got an appearance entered for her. Held that, though a fresh subpoena might be issued against the defendant, no attachment could be taken out upon it. [*Williams v. Townshend*] - - - - 296
10. Where a bill is ordered to be taken *pro confesso*, the decree may be made subsequently, although it is usually taken at the same time. [*Woollams v. Baker*] - - - 316
11. Where a defendant has been served with a subpoena under 2 & 3 Will. 4, c. 33, personal notice must be given to him before any subsequent process is applied for. [*Hasluck v. Stewart*] - - - - 321
12. The 14 days mentioned in 11 Geo. 4, & 1 Will. 4, c. 36, s. 11, are exclusive of the first and inclusive of last day. [*Ansdell v. Whitfield*] 356
13. Plaintiff obtained an order for a commission to examine witnesses but did not take it out. Held that, under the 17th order of 1831, the defendant was entitled to take out a commission. [*Rattenbury v. Fenton*] - - - - 368
14. A motion to open biddings for several lots purchased by different purchasers, on an advance of a certain sum for each lot, is irregular. [*Goodall v. Pickford*] - - - 379
15. An estate was put up to sale in four lots, and the timber on each lot was to be paid for by the purchaser according to a valuation which had been made. A. purchased lot 1: the other lots were not sold. B. opened the biddings, and, on the re-sale, purchased lots 1 and 2 for 2,140*l.*, and lot 3 at 380*l.* The court refused to open the biddings for lots 1 and 2 on the application of A., unless he would advance 10 per cent. on the price of the timber as well as the land, and would take lot 3 (in case B. should retire from it) at the price it had been sold for, in case it should not

- fetch the same price at the re-sale. [*Bates v. Bonnor*] - - - - 380
16. An attachment issued against a defendant before the making of a motion by him, but after service of the notice of motion, will not prevent the motion being made. [*Jeyes v. Foreman*] - - - - - 384
17. Personal service of an order for payment of costs by a plaintiff, to a person not a party to the suit, will be dispensed with where the plaintiff cannot be found. [*Hunter v. —*] - - - - - 429
18. A bill was filed against A. and others; but, before he was served with a subpoena, he went abroad. The bill was then amended, by stating that A. was out of the jurisdiction, and a decree was made. A. then filed an original bill to impeach the decree, on the ground that he was in England when the former bill was filed, but was not served with process. The defendants demurred on the ground that the decree could not be impeached except by a supplemental bill in the first suit. Demurrer over-ruled. [*Waterton v. Croft*] - - - 431
19. The Court still has jurisdiction to make an order for time to answer on the over-ruling of a demurrer. [*Ibid.*] - - - - - 431
20. Leave given to plaintiff, before answer, to sue out a commission in a suit to perpetuate testimony, the defendant having been attached, and still refusing to answer. [*Lancaster v. Lancaster*] - - - - 439
21. Motion, before decree, by the executor of a deceased defendant, that the plaintiff might revive the suit against him, or that the bill might be dismissed, as against the deceased, granted. [*Burnell v. The Duke of Wellington*] - - - 461
22. Where a report of scandal or impertinence has been excepted to, the Master cannot tax the costs of the reference, under the 22d order of 1833, without further order. [*Desanges v. Gregory*] - - - 473
23. Under the 10th order of 1833, the common injunction cannot be obtained on an amended bill until five weeks after appearance, and, if the defendant is then in default, the application must be made according to the old practice. [*Lee v. Ravenscroft*] - - - - - 474
24. Evidence cannot be read even on behalf of an infant, as to a fact not stated in the bill unless it is put in issue by his answer. [*Powys v. Mansfield*] - - - - - 565
25. The defendant's time for answering having expired, the plaintiff's clerk in court gave notice, on a Saturday, that he must attach the defendant at the next private seal, which was on Monday following; and, on that day, the plaintiff sealed an attachment. On the same day, the defendant, not knowing that the attachment had been sealed, applied for an order for time, and gave notice to the plaintiff's clerk in court, that he had done so. The attachment was discharged without costs, as the defendant had used due diligence in obtaining the order for time. [*Taylor v. Fisher*] - 566
26. Commission to examine witnesses at Madras, directed to the judges of the Supreme Court there. [*Murray v. Lawford and Others*] - 573
27. Where a Master reports as to mat-

- ter not referred to him his report ought not to be excepted to, but it ought to be referred back to him to be reviewed; and even if that is not done, the unwarranted finding will be disregarded. [*Jenkins v. Briant*] - - - - - 603
28. A. filed a bill against B., which B. answered, and then filed a cross-bill against A. A. not having answered the cross-bill, B. issued an attachment against him but was unable to serve it as A. was resident abroad. A. proceeded to examine witnesses in his cause. The Court on the application of B. ordered publication not to pass in A.'s suit until he should have put in his answer and cleared his contempt in B.'s suit, and the Court should order publication to pass. [*Palmer v. Leicester*] - 610
29. An attachment had issued against a defendant for want of answer. The answer was afterwards filed, and the defendant took an office copy of it, the costs of the contempt remaining unpaid. Held that the plaintiff had waived his right to enforce payment of the costs by process of contempt. [*Landars v. Allen*] - - - - - 619
30. By a mistake in the Registrar's office, an order, made on an undertaking to speed, was erroneously drawn up. The order was discharged, with costs of the application to discharge it; it being the duty of the party who procures an order, to see that it is properly drawn up. [*Ibid.*] - - - - 620
31. As the demurrer of the parol has been abolished by 11 Geo. 4, & 1 Will. 4, c. 47, an infant defendant is not entitled to have six months given to him after attaining 21, to show cause against a decree. [*Powys v. Mansfield*]- - - - 637
- See CROSS BILL.—NEW ORDERS.—OPENING BIDDINGS.—RE-EXAMINATION.
- PRINCIPAL AND AGENT.
- Where a principal has created a lien in favour of another person on funds in the hands of his agent, the agent may file a bill of interpleader against his principal and the other claimant. [*Smith v. Hammond*] - - 10
- PRINTS AND ENGRAVINGS.
- A. made a copy of a print invented by B., in colours, and of larger dimensions, and exhibited it as a diorama. The Court refused to restrain the exhibition, until the right had been established at law. [*Martin v. Wright*] - - - - - 297
- PRIORITY.
- See CONSTRUCTION, 9. 24.
- PRO CONFESSO.
- Where a bill is ordered to be taken *pro confesso*, the decree may be made subsequently, although it is usually taken at the same time. [*Woolams v. Baker*] - - - - - 316
- PROBATE DUTY.
- A testator gave to A. a power to dispose, by her will, of 5,000 l., part of his estate, on which probate duty was paid. A. exercised the power by her will. Held that probate duty was not again payable in respect of the 5,000 l. [*Vandiest v. Fynmore*] 570

PROCESS.

1. 'The defendant had been taken under an attachment for want of answer, but, on his paying the sheriff 40 l. to be repaid on putting in his answer, the sheriff at the request of the plaintiff's agent, discharged him. Motion for a messenger to take the defendant who had not put in his answer, refused. [*Swindell v. Swindell*] - - - - - 295
2. Where a defendant has been served with a subpoena under 2 & 3 Will. 4, c. 33, personal notice must be given to him before any subsequent process is applied for. [*Hasluck v. Stewart*] - - - - - 321

See DEMURRER, 4.

PRODUCTION OF DOCUMENTS.

1. A deed in the custody of a purchaser for valuable consideration which the bill impeached for fraud, ordered, under special circumstances, to be produced. [*Kennedy v. Green*] - - - - - 6
2. A voluntary deed belonging to the defendant, which the bill impeached for fraud, and which was in the custody of the defendant's solicitor, who claimed a lien on it, ordered to be produced for the plaintiff's inspection, after it had been proved by the defendant, and publication had passed. [*Fencott v. Clarke.*] - 8
3. Motion by a defendant for the production of a document admitted by the plaintiff to be in his custody, refused. [*Milligan v. Mitchell*] 186
4. To a bill for a discovery of stock standing in the name of the plaintiff's late father, either alone or jointly, for 20 years before and at

his death, and for an inspection of the bank books containing the entries of such stock, the bank, in their answer, set forth an account of the stock but declined to set forth a list of the books containing the entries. Held that they were not exempted from the production of their books, and therefore ought to set forth a list of them. [*Heslop v. The Bank of England*] - - - 192

5. If a defendant makes statements in his answer sufficient to show that he has incurred penalties, he cannot refuse to produce documents referred to in it, on the ground that they afford evidence of his being subject to the penalties. [*Ewing v. Osbaldiston*] - - - - - 608

PUBLIC POLICY.

- A. the proprietor of a newspaper, prevailed on B. to make and deliver to the Stamp-office, an affidavit that he, B., was the proprietor of the paper. B. afterwards agreed to sell the paper to D. A. having become insolvent, his assignees filed a bill to set aside the sale for fraud. Held that, as B. had at A.'s instance violated the 38 Geo. 3, c. 78, which requires the true names of the proprietors of newspapers to be inserted in the affidavit, his assignees were not entitled to the relief asked. [*Harmer v. Westmacott*] - - 284

PURCHASER.

1. A deed in the custody of a purchaser for valuable consideration, which the bill impeached for fraud, ordered under special circumstances to be produced. [*Kennedy v. Green*]

2. Testator devised his estates charged with debts and legacies. The devisee mortgaged the estate to A., subject, expressly, to the legacies. A. having called in his money, and the devisee requiring a further advance, they join in mortgaging the estate to B., but not expressly subject to the legacies, and B. is informed, falsely, by the devisee, that all the legacies had been paid. Held that B. took the estate subject to the legacies. [*Rogers v. Rogers*] 364

3. A purchaser from a devisee subject to debts and legacies, is bound to see his money applied in payment of the legacies, if the circumstances of the transaction afford evidence that the debts have been paid, and that the devisee is dealing with the estate as owner. [*Johnson v. Kennett*] 384

See REDEMPTION.—VENDOR AND PURCHASER.

PURCHASER FOR VALUABLE CONSIDERATION.

See PLEA AND PLEADING, 3.

RECEIVER.

- A receiver who had been discharged, did not pay in his balance, on the day fixed by the Master. Ordered that he should pay in the same, and also the amount allowed for his salary, with interest. [*Harrison v. Boydell*] - - - - - 211

See COVENANT.—INJUNCTION.

RECEIPTS FOR PURCHASE MONEY.

See VENDOR AND PURCHASER, 3.

RECOVERY.

If a tenant in tail suffers a recovery and declares uses which are void, he does not take back an estate tail, but an estate in fee. [*Tanner v. Radford*] - - - - - 21

REDEMPTION.

A. and B. being seised in fee, in right of their wives, of two undivided fourth parts of an estate, subject to a mortgage term, joined, in 1784, with the owner of the other moiety in conveying the estate, by lease and release, but without a fine, to a purchaser in fee, and the mortgage was paid off, and the term assigned to attend. The purchaser and those claiming under him had been in possession from the date of the conveyance. A.'s wife survived him, and died in 1825, leaving one of the plaintiffs her heir. B.'s wife died in 1818, leaving the other plaintiff her heir. B. died in 1826. In 1830 the plaintiffs brought an ejectment, but were nonsuited by the defendants setting up the term. In 1831 they filed a bill to redeem, which was dismissed on account of the length of possession by the defendants and those under whom they claimed. [*Ashton v. Milne*] - 369

RE-EXAMINATION.

Liberty given to the plaintiff to re-examine one of his witnesses to part of an interrogatory as to which the examiner had omitted to take down the deposition. [*Bridge v. Bridge*] 352

RELEASE.

See PLEA AND PLEADING, 8.

REMAINDERS.

See CROSS-REMAINDERS.

REMOTENESS.

Testator gave annuities to his widow and son and directed the surplus of his personal estate and the rents of his real estate to be invested in stock, and the dividends to be accumulated, and to be and remain assets for improvement, in the hands of his executors, until the time and times should arrive when distribution should be made, as thereby directed. The testator then directed his real estates to be sold after the decease of the survivor of his wife and son and the proceeds to be invested in stock, and the dividends to be accumulated, to be and remain assets for improvement in the hands of his executors, for the benefit of his grandchildren and his nephew T. O. and to be distributed as they should become of the age of 25 years. The testator had two grandchildren born in his lifetime, both of whom died infants, one in his lifetime and the other after his death. Another grandchild was born after the testator's death who was an infant when the bill was filed. T. O. survived the testator and attained 25. Held that the bequest was void for remoteness. [*Porter v. Fox*] - - - 486

REPORT.

In taking accounts directed by the decree, certain payments which had been made by A. and B. jointly, were represented and reported by the Master to have been made by B. separately. After the report had been absolutely confirmed, and B.

had become bankrupt, the Court, on the petition of A. discharged the order to confirm the report, and referred it back to the Master to review his report. [*Prentice v. Mensal*] - - - - - 271

See EXCEPTIONS, 2.—PRACTICE,
1. 3. 27.

REPRESENTATIVES.

The word "representatives" in a will, construed to mean descendants, the context requiring it. [*Styth v. Monro*] - - - - - 49

See LEGAL REPRESENTATIVES.—
PERSONAL REPRESENTATIVES.

RESIDUARY BEQUEST.

A bequest of "all my household furniture, implements of trade, cattle, sheep, and all the rest and residue of my monies, securities for money and personal estate whatsoever and wheresoever, not hereinbefore disposed of," is a residuary bequest. [*Taylor v. Taylor*] - - - - 246

See CONSTRUCTION, 14.

RESTRAINT ON ALIENATION.

See ALIENATION.

RESTS.

See ACCOUNT, 2.

RESULTING USE.

See TENANT IN TAIL.

REVIVOR.

Motion, before decree, by the executor of a deceased defendant, that the plaintiff might revive the suit against him, or that the bill might

be dismissed as against the deceased, granted. [*Burnell v. The Duke of Wellington*] - - - - - 461

See ACQUIESCENCE.

REVOCATION.

A testator devised all his real estates to his children equally, and afterwards entered into contracts for the sale of his estates, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees who were infants. Held that though the contracts were properly abandoned, the will was revoked as to the premises therein comprised. [*Tebbot v. Voules*] 40

SALE AND EXCHANGE.

See POWER OF SALE AND EXCHANGE.

SATISFACTION.

1. On a marriage, the father and husband of the lady, gave bonds, for 3,000*l.* each, to be paid to trustees upon the trusts of the settlement. The father died leaving the whole of the principal and some of the interest due on his bond, and having bequeathed 3,000*l.* to his executors upon the same trusts, for the benefit of his daughter and her husband and their issue, as were declared by the settlement of the trust-moneys therein comprised. Held that the legacy was not a satisfaction of the father's bond. [*Foster v. Evans*] 15
2. Testator being seised of a reversion in fee expectant on the death and

failure of issue male of himself and his brother, and being possessed of a leasehold estate and of stock in the funds, devised the reversion to trustees for the term of 1,000 years and gave to them the leasehold estate and stock, in trust to raise 10,000*l.*, which he directed to be held in trust for his niece Julia, the daughter of his brother, for life, and, after her decease, in trust for any husband who might survive her, and, after the decease of the survivor of them, in trust for all the children of his niece who should be then living. The niece married about three months after the date of the will: and, by a settlement made in contemplation of the marriage, the testator, in consideration of natural love, &c. for his niece Julia, the daughter of his brother, and for her advancement in life and to provide a maintenance for her, charged the reversion with the payment (after the death of the survivor of himself and his brother without leaving issue male who should attain 21) of the interest of 10,000*l.* to his niece's husband for life, and after his decease, to his niece for life, and, after the decease of the survivor, with the payment of 10,000*l.* to trustees in trust for the younger children of the marriage. About a year afterwards, the testator, by a codicil, disposed of a certain portion of his property not before mentioned, and, in all other respects, confirmed his will. The testator died a bachelor. His brother afterwards died leaving issue Julia and five other daughters. Held that the provision made by the settlement was not a satisfaction of the provision made by the will. [*Poncy v. Mansfield*] - - - - - 523

3. An uncle made a provision, by his will, for his niece and afterwards by a settlement on her marriage. The question being whether the latter was intended to be a satisfaction for the former, extrinsic evidence was admitted to show that the uncle stood in *loco parentis* to his niece. [*Ibid.*]
4. No person can be held to stand in *loco parentis* to a child whose father is living and who resides with and is maintained by the father according to his means. [*Ibid.*]
5. By a marriage settlement, a term of years was created for raising portions for younger children, which were to vest at the usual periods, but were not to be paid till after the father's death. And there were the usual clauses for survivorship and maintenance, and also a proviso that any advance of money made by the father in his lifetime to the children, should be a satisfaction, *pro tanto*, unless the father should, in writing, direct the contrary. The father devised all his real estates not in settlement to trustees, in trust to sell and pay his debts, &c., and to pay the surplus equally amongst all his children, (except his eldest son) at the usual times, and if any died under 21 leaving issue, their shares were to go to their issue, but, if they left no issue, then to the survivors; and the will contained a clause for the advancement of the children, but was silent with respect to the provision being a satisfaction of the portions. The eldest son filed a bill, insisting that the provision by the will was intended to be a satisfaction of the portions. Some of the younger chil-

dren demurred. The Court was of opinion that the provision by the will, although it was to arise from the sale of lands, and although the will contained no declaration on the subject, might be a satisfaction of the portions. But the demurrer was overruled, as it could not appear, until the hearing, whether there would be any fund that might be a satisfaction. [*Fazakerley v. Gilbrand*] - - - - - 591

SCANDAL.

See NEW ORDERS, 7.

SCOTCH SETTLEMENT.

By a Scotch settlement, a sum of stock, was settled on the husband and wife for their lives, and, after the death of the survivor, on their children, and, failing children, on the nearest heirs of the wife: and she was empowered at any time in her life, and even on death-bed, to bequeath or dispose of the stock, to any person and in any manner she might think proper. Held that the power was not intended to be available, except in the event of there being a failure of children of the marriage. [*Peddie v. Peddie*] - - - - - 78

SECURITIES FOR MONEY.

See WILL, 9.

SEPARATE USE.

1. By a marriage settlement, money and stock were assigned to trustees, in trust to receive the income, during the life of the lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her

coverture, but no payment to be made by anticipation; and it was declared that the income should not be subject to the debts, &c. of R. G., her intended husband, and, after her decease, in case he should survive, in trust to permit him to receive the income for his life, &c. The husband died in the lifetime of his wife, and she married again. Held that the provision for the separate use of the lady without anticipation, was confined to the first marriage. [*Knight v. Knight*] - - - 121

2. Testator directed the interest of 10,000*l.* to be for the separate use of his daughter Jane Lane, for her life, free from the debts of her husband. The husband died, and his widow married again. Held that the trust for her separate use ceased on the death of her first husband. [*Benson v. Benson*] - - - 128

3. A trust for the separate use of a woman, whether single or married, is valid. [*Davies v. Thornycroft*] 420

SETTLEMENT.

By a marriage settlement, money and stock were assigned to trustees, in trust, to receive the income during the life of the lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her coverture, but no payment to be made by anticipation, and it was declared that the income should not be subject to the debts, &c. of R. G., her intended husband, and, after her decease, in case he should survive, in trust to permit him to receive the income for his life, &c. The husband died in the lifetime of his wife, and she married again.

Held that the provision for the separate use of the lady without anticipation, was confined to the first marriage. [*Knight v. Knight*] 121

See CONSTRUCTION, 13. 20.—DECREE, 2.—DRED, 5.—MARRIAGE ARTICLES.—PORTIONS, 1.—POWER OF SALE AND EXCHANGE.—SCOTCH SETTLEMENT.

SHIP.

By the 53 G. 3, c. 159, the responsibility of shipowners for damage done by their ships to other vessels, is limited to the value of the ship doing the damage. Held that such value must be ascertained as at the time of the accident. [*Dobree v. Schroder*] - - - - - 291

See BANKRUPT, 2.

SIDE-CLERK IN THE EX-CHEQUER.

See INJUNCTION, 2

SOLICITOR AND CLIENT.

1. If a solicitor retains money received by him, in his character of solicitor, for the use of his client, his bill is taxable, though it contains no charges for business done in a court of law or equity. [*In Re Barker*] - 476
2. Items in a solicitor's bill for preparing and settling a bill in equity, will render the solicitor's bill taxable, though the bill in equity was never filed. *Scmble*. [*Ibid.*]

SPECIALTY DEBT.

Where a testator has entered into a

voluntary covenant to pay an annuity, the annuitant is a specialty creditor on his real estates, notwithstanding the annuity did not become in arrear till after the testator's death. [*Jenkins v. Briant*] 608

SPECIFIC LEGACY.

Testator bequeathed 7,000*l.* secured on mortgage of an estate at W. belonging to R. T. The 7,000*l.* and interest were received, after the date of the will, by the testator's agent on his account, and, immediately afterwards, 6,000*l.* part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount. Held that the legacy was specific, and, notwithstanding the 6,000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed. [*Gardner v. Hatton*] - - - - - 98

See ADEMPMENT, 1.

SPECIFIC PERFORMANCE.

The costs of a suit for specific performance against the infant heir of the vendor, ordered to be paid out of the purchase-money. [*Prytarch v. Havard*] - - - - - 9

See AGREEMENT.

STATUTES.

See CONSTRUCTION OF ACTS OF PARLIAMENT.

STATUTE OF LIMITATIONS.

See DEMURRER, 2.—REDEMPTION. VOL. VI.

SUBPŒNA.

See ATTACHMENT.

SUBSTITUTIONAL LEGACIES.

See CUMULATIVE LEGACIES. WILL, 21.

SUPPLEMENTAL BILL.

See PRACTICE, 18.

TAXATION OF BILL.

See SOLICITOR AND CLIENT.

TENANT FOR LIFE.

1. A mansion-house, park, and pleasure grounds with certain villas on the estate, were limited in strict settlement; and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion-house, sell the materials and apply the proceeds in paying off incumbrances on the estates. The house was, accordingly, pulled down, but the tenant for life unimpeachable of waste, was afterwards restrained from felling the ornamental timber in the park and grounds. [*Wellesley v. Wellesley*] 497
2. A tenant for life of an undivided share of an estate, with remainders to his unborn sons in tail, may file a bill for a partition; and the decree will be binding on the sons when *in esse*. [*Gaskell v. Gaskell*] 643

See CONSTRUCTION, 23.

TENANT IN TAIL.

If a tenant in tail suffers a recovery, 3 A

and declares uses which are void, he does not take back an estate tail, but an estate in fee. [*Tanner v. Radford*] - - - - - 21

TIMBER.

See WASTE.

TITLE.

Testator by his will in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living, but, if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me, J. S., and which will I some time since made in my own handwriting, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil, Ann Aspinall had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. [*Howarth and Others v. Smith*] - - - - - 161

See VENDOR and PURCHASER.

TRUST.

See WILL, 24.

TRUST FOR SEPARATE USE.

A trust for the separate use of a woman, whether single or married, is valid. [*Davies v. Thornycroft*] 420

TRUSTEE.

The devisee of a mortgage is not a trustee for the executors of the testator within 11 G. 4, & 1 W. 4, c. 60. [*Ex Parte Payne*] - - - - - 645

TRUSTEE AND CESTUI QUE TRUST.

Trustees, who were directed so sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of 6,600 l. for the estate; but they afterwards sold it for 3,600 l. The Court charged them with the loss, but gave them their costs, as their conduct had not been wilful or perverse. [*Taylor v. Tabrum*] - - - - - 281

See EXECUTOR, 2.—INFANT TRUSTEE.—PLAINTIFF.—VENDOR AND PURCHASER, 3.

USES.

See TENANT IN TAIL.

VENDOR AND PURCHASER.

1. The donees of a power of sale and exchange, may pay money for owelty of exchange, although they are not expressly authorized so to do. [*Bertram v. Whichcote*] - - - - - 86
2. Testator by his will, in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living; but, if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me, J. S., and which will I some time since made in my own handwriting,

and thereby devised to John Aspinall as therein mentioned." At the date of the codicil, Ann Aspinall, had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. [*Howarth and Others v. Smith*] - - 161

3. Testator devised his estates to trustees in trust to sell, and declared their receipts to be sufficient discharges: and he directed his trustees to complete any contracts, for the sale of his estates, entered into during his lifetime, and remaining incomplete at his death. Held that his executor was the proper party to give receipts for the purchase-moneys of the estates contracted to be sold by the testator. [*Eaton v. Sanxter*] - - - - - 517
 4. Notice to a purchaser of judgments against the vendor, whose estate is limited to uses to bar dower, does not prevent the purchaser from taking the estate free from the judgments under an exercise of the power reserved to the vendor. [*Ibid.*]
- See DEED, 4.—PRACTICE, 3.—PURCHASER, 2, 3.—OPENING BIDDINGS. SPECIFIC PERFORMANCE.

VESTING.

See CONSTRUCTION, 19. 27.

VOLUNTARY DEED.

- A. made a voluntary assignment of a

sum of money being, at the time, indebted to B. on balance of a running account. A. afterwards made payments to B., exceeding in amount the balance due at the date of the assignment; but the balance continually increased. The assignment was set aside at the suit of B. [*Whittington v. Jennings*] - - 493

See ESCROW.—PRODUCTION OF DOCUMENTS, 2.

WAIVER.

See CONTEMPT.

WASTE.

A mansion-house, park, and pleasure grounds, with certain villas on the estate, were limited in strict settlement; and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion-house, sell the materials and apply the proceeds in paying off incumbrances on the estates. The house was, accordingly, pulled down, but the tenant for life unimpeachable of waste, was afterwards restrained from felling the ornamental timber in the park and grounds. [*Wellesley v. Wellesley*] 497

WIDOW.

A rent-charge expressed to be for a jointure, and in lieu of dower and thirds at common law, does not bar the jointress of her distributive share in her husband's undisposed-of personal estate. [*Colleton v. Garth*] 19

WILFUL DEFAULT.

See EXECUTOR, 2, 3.

WILL.

1. A testator devised all his real estates to his children equally, and, afterwards, entered into contracts for the sale of his estates, but died before they were completed. The purchasers afterwards abandoned their contracts, because they were unable to procure a conveyance from some of the devisees who were infants. Held, that though the contracts were properly abandoned, the will was revoked as to the premises therein comprised. [*Tebbot v. Voules*] 40
2. Testator bequeathed 700*l.* to his daughter's husband, his executors, &c. in trust to pay the interest to his daughter, for her separate use for life, and after her death, to such persons as she should appoint by will, and, in default of appointment, to her personal representatives. The daughter died without having made any appointment. Held that her next of kin, to the exclusion of her husband, were entitled to the 700*l.* [*Robinson v. Smith*] - - 47
3. The word "representatives" construed to mean "descendants," the context of the will requiring it. [*Styth v. Monro*] - - - - 49
4. Testator bequeathed the remainder of his property to his sister, A.B., to dispose of amongst her children as she might think proper. Held that A. B. took no interest in the residue. [*Blakeney v. Blakeney*] 52
5. Testatrix devised all her messuages situate in Denmark-court. She had five houses situate in the court, and another which fronted towards the Strand, and formed one side of a covered passage leading to the place

where the others were situate, and which had attached to the back of of it an outbuilding abutting on ground in Denmark-court. Held that the five houses only passed. [*Newton v. Lucas*] - - - - 54

6. A testator, after giving specific and pecuniary legacies, willed that A. and B. should divide equally, any monies which might remain to his account, after payment of his debts and pecuniary legacies. The testator, at the date of his will and at his death, had money accounts subsisting between him and his bankers, and other persons. Held that the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts and legacies. [*Hastings v. Hane*] 67
7. This Court is not bound by the decision of the Ecclesiastical Court as to the effect of a bequest. [*Ibid.*]
8. A testator seised of freeholds and copyholds in fee, and leaseholds for lives, devised "all his real estate whatsoever and wheresoever." Held that the copyholds and leaseholds for lives, as well as the freeholds in fee, passed, notwithstanding some parts of the will were inapplicable to them. [*Weigall v. Brome*] - 99
9. Testator gave to his son, in case he should live to attain 21, such part of his real estate, as his son should choose, but not exceeding the yearly value of 350*l.*, and, to his daughter, such part of his real estate as should remain after his son should have made his choice, or of the whole of his real estate in case his son should not live to choose his part, as she should choose, but not exceeding

the yearly value of 360*l.* Held that the son was entitled to priority of choice, on attaining 21, and that there was to be no apportionment, although he might not leave for the daughter lands of the yearly value of 360*l.* [*Ibid.*]

10. A testator after several devises and bequests, gave, devised and bequeathed all his messuages, chattels real, ready money, securities for money, debts, and personal estate to A. and B., their heirs, executors, administrators and assigns, upon certain trusts. Held that the legal estate in the premises mortgaged to the testator in fee, passed to A. and B., the trusts declared not being repugnant to that construction. [*Mathew v. Thomas*] - - - - - 115
11. Testator directed his real estates to be settled on certain persons in strict settlement, and that there should be inserted, in the settlement so to be made, powers of leasing, sale, partition, and exchange. "And my will is that, in such intended settlement, shall be inserted all such other proper and reasonable powers as are usually inserted in settlements of the like nature." Held that a power to appoint new trustees, was a proper and reasonable power to be inserted in the settlement. [*Lindow v. Fleetwood*] 152
12. Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews George and Charles, and the principal to be applied either in binding them apprentices at the age of 14, or to be reserved till they attained 21, to commence business. "In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under 21. Held that James and Henry were entitled to the residue. [*Prestwich v. Groombridge*] 171
13. Testator directed his trustees to sell his real and personal estate, and to apply the produce in paying his debts, and the legacies thereafter given. The testator afterwards gave legacies by codicils, one of which was duly attested. Held that only the legacies in the will were payable out of the real estate. [*Strong v. Ingram*] - - - - - 197
14. Testator after directing all his debts to be fully paid, devised his real estates to different persons, and charged certain of them with specific sums. Held that those estates, as well as the others, were charged with the debts. [*Taylor v. Taylor*] 246
15. Testator bequeathed a sum of 6,000*l.* in trust for his daughter for life, "and, on her decease, I give the said 6,000*l.* to the children, or their descendants, of T. F. in such proportions to each as my daughter may direct." The daughter died without having made any appointment. Held that the children of T. F. were entitled to the fund, to the exclusion of their issue. [*Jones v. Torin*] - - - - - 255
16. Testatrix gave a weekly sum to A. for his life or until he should attempt to assign, &c. the same, and

- she directed a sum of stock to be set apart to answer the payments; and she gave to A. the power of leaving the stock, after the payments to him should cease, to and for the benefit of his wife and children, as he should by will, duly executed, give and bequeath the same. A. died having made an invalid appointment of the stock. Held that there was an implied gift to his wife and children in default of appointment. [*Brown v. Pocock*] - - - - - 257
17. Testator gave a sum of stock to his wife for life, and after her death to his sons and daughter; and he directed the interest of his daughter's share to be paid to her for her separate use, for life, and, at her decease the capital to be divided amongst such children as she should have living at his decease; the shares of sons to be paid at 21, and of daughters at 21 or marriage, provided their mother was then dead, otherwise, her children's shares were not to be paid to them until her decease: but if the testator's daughter had no children living at her decease, her share was to be equally divided amongst such of his sons as should be then living: and if any of his said sons and daughter should die before his wife, and without leaving issue, their shares were to be divided among his other children. Held that the daughter's children living at the testator's death, took absolute vested interests at 21, though their mother was still living; and that her interest in the share of one of the testator's sons who died in the lifetime of his widow, was not subject to the same trusts as her original share, but vested in her absolutely. [*Gibbons v. Langdon*] 280
18. Testator devised his estates to trustees, in trust to pay out of the rents, 300*l.* a year for the maintenance of his son's children, and to pay the surplus rents to his son during his life, for the maintenance of himself and his family, but so as he should not have any power to charge or alienate the same: provided that, if his son should in any manner impede or frustrate the trusts of the will, then the surplus rents should be no longer paid to him, but should be accumulated by the trustees for the benefit of the son's children. The son conveyed his interest under the will to trustees for his creditors. Held that, thereupon, the trust for accumulation took effect. [*Lewes v. Lewes*] 304
19. Testator devised an estate to trustees, in trust for R. T. for life, and after the death of R. T., in trust to convey the estate unto, between or amongst all and every and such one or more of the child or children of R. T., who should be living at his decease, and the issue of such of them as should be then dead leaving issue, such issue to take between or amongst them the share which their parent or parents would have been entitled to if then living. R. T. survived the testator, and died leaving several children and the issue of another child, who was dead at the date of the will. Held that such issue were entitled to take, amongst them, an equal share of the estate with the surviving children. [*Tytherleigh v. Harbin*] - - - - - 329

20. Testator, by his will, gave an annuity, to his daughter, out of certain estates, for her separate use. By a codicil, he gave her a life estate, for her separate use, in the same estates. Held that the daughter was entitled to the life estate only. [*Graves v. Hicks*] - - 391
21. Testator charged his estates with an annuity in favour of his wife, and, subject thereto, he devised the estates in strict settlement. Afterwards, by his will and codicils, he charged the estates with several other annuities to his wife and other persons. Held that the first-mentioned annuity was the primary charge on the estates. [*Ibid.*]
22. Testator devised an estate to his daughter for life, with remainder to her husband for life, and charged other estates with the payment of an annuity to his daughter, and, after her death, with the payment of an annuity to her husband. He then made a codicil which, in effect, revoked the husband's life estate in remainder. By a subsequent codicil, he gave, to the husband, a life estate in possession in the first estate, and also an annuity in possession, to the same amount and charged upon the same estates as the former annuity. Held that the second annuity was substituted for the first. [*Ibid.*]
23. Testator gave the interest of a fund to his wife for life, and after her death, to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child. Held that the child became entitled, on the widow's death, to have one-fourth of the capital transferred to her. [*Woodstock v. Shillito*] - - - - - 416
24. Testator bequeathed 5,000*l.*, to A. if he attained 21, but if he should not attain that age or die without leaving issue male, then over. Held that the 5,000*l.* vested absolutely, in A. on his attaining 21. [*Mytton v. Boodle*] - - - - - 457
25. Testator bequeathed the whole of his property to his wife, for her life, and directed that, upon her death, one-third should devolve on his daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that should she not marry again and have other children, her affection for their daughter would induce her to make the daughter her principal heir. The widow died unmarried. Held that she took an absolute interest in the two-thirds under the will. [*Hoy v. Master*] - - 568
26. Testator gave his residuary estate to trustees in trust for his sisters' younger children equally, and to vest in them at the usual periods; and he directed his trustees, during the minorities of the children, to pay the interest of their shares to his sisters, or to the guardians of the children, to be applied for their maintenance and education. Held that the sisters were entitled to receive the interest of their children's shares during the minorities of their children. [*Berkeley v. Swinburne*]

See CONSTRUCTION, 11, 12, 20. 22.—
 HEIR.—RE MOTENESS.—RESIDUARY
 BEQUEST. — VENDOR AND PUR-
 CHASER, 2.

WITNESS.

1. Liberty given to the plaintiff to re-
 examine one of his witnesses to part
 of an interrogatory as to which the
 examiner had omitted to take down

the deposition. [*Bridge v. Bridge*]
 352

2. Leave given to plaintiff, before
 answer, to sue out a commission in
 a suit to perpetuate testimony, the
 defendant having been attached
 and still refusing to answer. [*Lan-*
caster v. Lancaster] - - - 439

YEARLY RESTS.

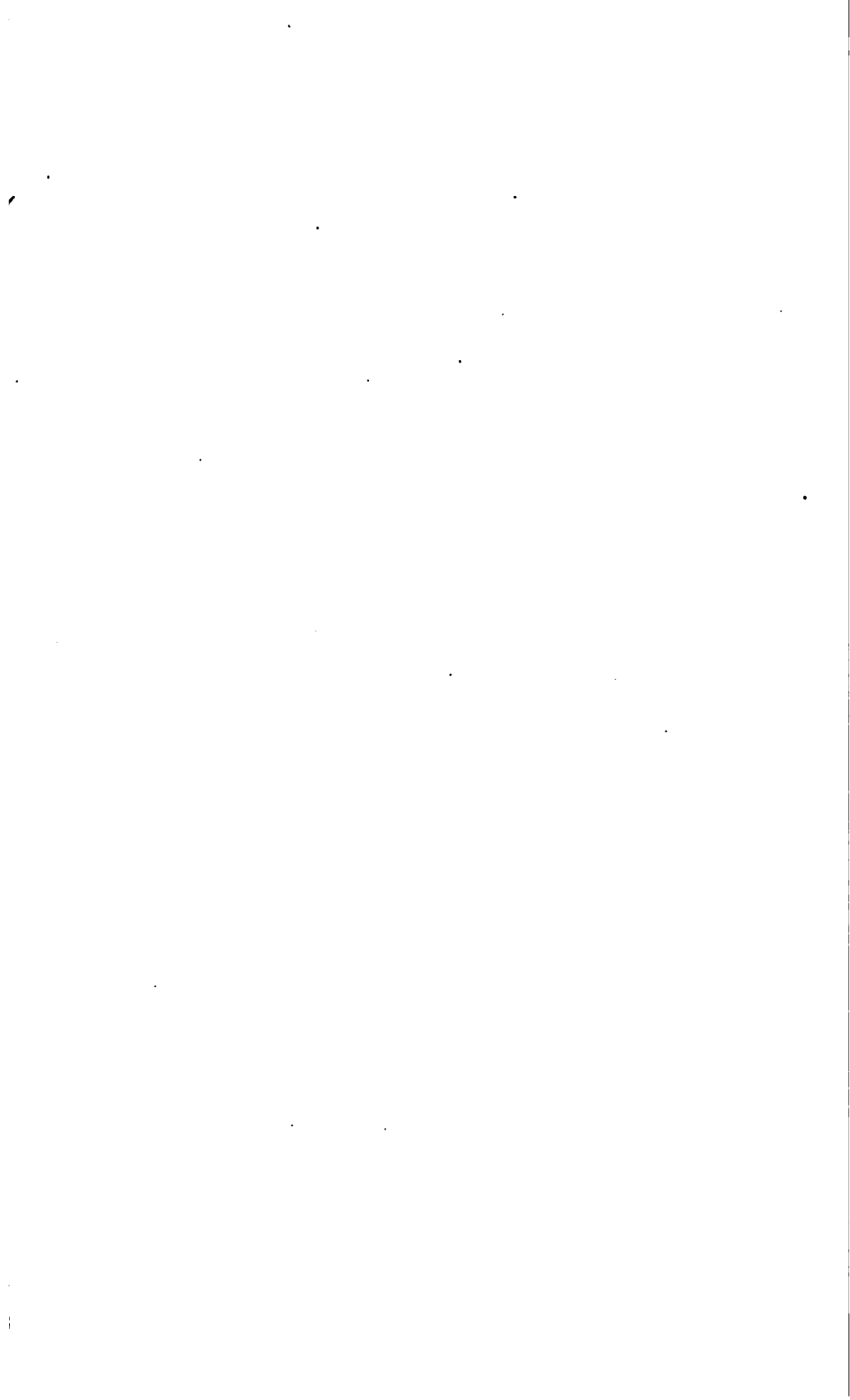
See ACCOUNT, 2.

END OF VOL. VI.

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